SUPREME COURT OF THE UNITED STATES.

No. 268. 92.

THE CITY OF CHICAGO, PL'FF IN ER.,

vs.

ALLEN ROBBINS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

GEO. S. GIDEON, printer, 511 Ninth street, Washington, D. C.

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UNITED STATES OF AMERICA,
Northern District of Illinois. } *ss.*

Pleas in the Circuit Court of the United States of America, for the Northern District of Illinois, held at the city of Chicago, in said District, before the Hon. Thomas Drummond, District Judge, and in the absence, pro tempore, of the Hon. John McLean, one of the Justices of the Supreme Court of the United States, sole Judge of said Circuit Court, on Monday, the twenty-eighth day of May, in the May term of said Court, in the year of our Lord one thousand eight hundred and sixty, and of our Independence the eighty-fourth year.

WM. H. BRADLEY,
Clerk.

THE CITY OF CHICAGO, }
vs.
ALLEN ROBBINS. }

Northern District of Illinois, *ss.*

The city of Chicago, plaintiff in this suit, who is a citizen of the State of Illinois, puts in its place John C. Miller, Esq., and George F. Crocker, Esq , its attorneys, against Allen Robins, defendant, who is a citizen of the State of New York, in a plea of trespass.

Northern District of Illinois, *ss.*

Be it remembered, that on this day, to wit: the first day of March, in the year of our Lord one thousand eight hundred and fifty-eight, came the said defendant, by his said attorney, and filed in the office of the Clerk of the Circuit Court of the United States for the Northern District of Illinois, a transcript from the Superior Court of Cook County, State of Illinois, and also, at the same time, filed the following Exhibits, "A," "B," "C" and "D," which said transcript and Exhibits, "A," "B," "C" and "D" are in the words and figures following, to wit:

TRANSCRIPT.

State of Illinois, County of Cook, *ss.*

Pleas before the Honorable John M. Wilson, Judge of the Cook County Court of Common Pleas, within and for the county and State aforesaid, at a regular term of said Cook county Court of Common Pleas, begun and holden at the court-house in the city of Chicago, in said county and State, on the first Monday, being the first day of February, in the year of our Lord one thousand eight hundred and fifty-eight, and of the Independence of the United States of America the eighty-second.

Present,

The Hon. JOHN M. WILSON,
Judge.
CARLOS HAVEN,
Pros. Attorney.
JOHN L. WILSON,
Sheriff.

Attest,
WALTER KIMBALL,
Clerk.

Be it remembered, that on the thirteenth day of February, A. D., eighteen hundred and fifty-eight, said day being one of the days of the February term of the Cook County Court of Common Pleas, in the year aforesaid, the following proceedings were had in said Court and entered of record, to wit:

THE CITY OF CHICAGO,
vs.
ALLEN ROBBINS.
} Trespass on the case.

And now, upon this day, comes the said defendant, Allen Robbins, by his attorneys, Stuart & Ayers, and files herein his petition, varified by affidavit, stating that he is not a citizen of the State of Illinois, but is a citizen of the State of New York, and prays that this cause may be removed for trial into the United States Circuit Court, in the northern District of Illinois, and said defendant also files herein his bond, with good and sufficient security for his entering in said United States Circuit Court, on the first day of its next session, this cause, and his appearance therein, according to the act of Congress in such case, made and provided, and on motion of said defendant's attorneys—

It is ordered by the Court, that this cause be, and the same hereby is transferred to the United States Circuit Court, in the northern District of the State of Illinois, for trial.

State of Illinois, County of Cook, *ss.*

I, Walter Kimball, Clerk of the Cook County Court of Common Pleas, in and for the county and State aforesaid, do hereby certify that the foregoing is a true copy of an order, made and entered on the thirteenth day of February last past, in said Court, in the case of the city of Chicago, plaintiff, and Allen Robbins, defendant, and that the papers herewith transferred, marked A, B, C, and D, are the original, and are the papers in said cause.

Certified under my hand and the seal of said Court, at the city of Chicago, in said county, this 1st day of March, [SEAL.] A. D., 1858.

WALTER KIMBALL,
Clerk.

Endorsed.
Filed March 1st, 1858.
WM. H. BRADLEY,
Clerk.

Exhibit "A."

Cook County Court of Common Pleas.

CITY OF CHICAGO,
vs.
ALLEN ROBBINS.

Please issue a summons, in the above entitled cause, directed to the Sheriff of Cook County, action trespass on the case, damages $25,000, and oblige,

Yours, truly, JOHN C. MILLER,
Plaintiff's Attorney.

To Walter Kimball,
Clerk of Cook County Court of Common Pleas.

Endorsed.
Filed March 1st, 1860.
WM. H. BRADLEY,
Clerk.

Exhibit "B."

State of Illinois, Cook County, *ss.*

In the Cook County Court of Common Pleas, of the February term, A. D., 1858.

The City of Chicago, plaintiff in this suit, by John C. Miller, its attorney, complains of Allen Robbins, defendant in this suit, who has been summoned, &c., of a plea of trespass on the case.

And that, whereas, the said plaintiff is a body corporate established and existing under the laws of the State of Illinois, and having, by its charter, exclusive power over the public streets of the said city in the county of Cook aforesaid, and it being the duty of the said plaintiff to remove and abate any nuisances and obstructions on the said streets; to control, regulate and repair the same, and to protect the same from any encroachment or injury. And whereas, the said defendant, before and at the time of committing the grievance hereupon next mentioned, was possessed of a certain building, with the appurtenances, situate and being in a certain street in the said city in the county aforesaid, called Wells street, which said street, at the time of the committing of the said grievance, and from thence hitherto, has been and still is a common public street or highway for all persons, to go, when pass and repassen by and with horses, carriages and otherwise, at their free will and pleasure, to wit: at the county aforesaid; yet the said defendant, well knowing the premises whilst he was so possessed of the said building with the appurtenances as aforesaid, to wit: on the twenty-eighth day of December, A. D., 1856, at the county aforesaid, wrongfully and unjustly dug, opened and made in the said street and highway, on the eastern side thereof, next to and adjoining the said building, a large pit or hole of great length, width and depth, to wit: of the length of one hundred feet, of the width of four feet, and of the depth of fifteen feet, and wrongfully and injuriously suffered the said pit or hole to remain, during the said day and during the night-time of the said day, wholly uncovered and unguarded, and without any sign or warning of danger to the persons passing along the said street or highway.

By means and in consequence of which said negligence and improper conduct of the said defendant in that respect afterwards, to wit: On the said twenty-eighth day of December, A. D., 1856, between the hours of seven and nine o'clock in the evening of the said day, to wit: at the county aforesaid, one William H. Woodbury, then and there, in the exercise of ordinary care and prudence for his personal safety, lawfully going and passing over said street, fell, and was violently thrown into the said pit or hole, and was then and there greatly injured and damaged thereby, and then and there by reason of the premises, the said Wm. H. Woodbury became sick, sore and lame, and was obliged to expend large sums of money in endeavoring to be cured of the said wounds and injuries received as aforesaid, to wit: the sum of one hundred dollars, and by reason of the premises, the said Wm. H. Woodbury was prevented from performing and transacting his lawful affairs to be by him performed and transacted, and was otherwise greatly injured and damaged thereby,

and in order to obtain compensation for the injuries and damages so sustained by the said William H. Woodbury as aforesaid, and which were so as aforesaid occasioned by the negligence and improper conduct of the said defendant, he, the said William H. Woodbury, at a term of this honorable Court, begun and holden at Chicago, in the county aforesaid, on the first Monday in February, A. D., 1857, caused an action at law to be brought against the said plaintiff in the said Court, and such proceedings were thereupon had that afterwards, to wit: at the June Special Term of the said Court, in the same year, it was adjudged by the said Court, that the said William H. Woodbury should recover against the said plaintiff for his damages by him sustained in the premises, the sum of fifteen thousand dollars and twenty-two dollars and twenty-five cents for his costs and charges, by him about his suit in that behalf expended, whereof the said plaintiff was convicted as by the record and proceedings thereof more fully appear, and upon which said judgment an execution by writ of fieri facias was afterwards, to wit: on the 13th day of July, A. D., 1857, at the county aforesaid, issued against the said plaintiff by the said William H. Woodbury, directed to the Sheriff of the county of Cook aforesaid, whereby the said Sheriff was commanded, that of the lands and tenements, goods and chattels of the said city of Chicago, he should cause to be levied the damages and costs aforesaid, and that he should have those moneys ready to render to the said William H. Woodbury for his said damages and costs, and make return of the said writ, with an endorsement thereon, in what manner he should have executed the same in ninety days from the date thereof, which said writ, before the delivery thereof to the said Sheriff, was duly indorsed, and was afterwards, to wit: on the day and year last aforesaid, at the county aforesaid, delivered to the said Sheriff to be executed in due form of law.

By virtue of which said writ, the said Sheriff afterwards, and before the return of the said writ, to wit: on the day and year last aforesaid, at the county aforesaid, seized and took in execution divers goods and chattels, lands and tenements of the said plaintiff of great value, to wit: of the value of the monies endorsed on the said writ and directed to be levied as aforesaid. By means of which said several premises, the said plaintiff was not only forced and obliged to pay, and did necessarily pay to the said William H. Woodbury the said several sums of fifteen thousand dollars and twenty-two dollars and twenty-five cents; but was also forced and obliged to pay, and did necessarily pay the sum of sixty-four dollars and ninety-nine cents for interest on the said sum of fifteen thousand dollars, and the sum of one hundred and eight dollars and seventy cents for Sheriff's

fees on the said execution, so as aforesaid issued by the said Wm. H. Woodbury on the said judgment, and was also forced and obliged to expend, and did necessarily expend divers other sums of money in and about defending the said suit and proceeding of the said William H. Woodbury, in the whole, amounting exclusively of the said sums of fifteen thousand dollars and twenty-two dollars and twenty-five cents, to a large sum of money, to wit: the sum of five thousand dollars, and was, and is by means of the premises otherwise greatly injured and damnified, to wit: at the county aforesaid.

And also, for that whereas, before and at the time of the committing of the grievance by the said defendant as hereinafter mentioned, there was, and from thence hitherto, has been and still is a certain other street in the said city, in the said county aforesaid, for all persons to go, return, pass and repass in, by and with horses, carriages and otherwise, at their free will and pleasure; yet the said defendant, well knowing the premises heretofore, to wit: on the day and year aforesaid, at the county aforesaid, wrongfully and unjustly dug, opened and made in the said street a large pit or hole of great length, width and depth, to wit: of the length of one hundred feet, of the width of four feet, and depth of fifteen feet, and wrongfully and injuriously suffered the said pit or hole to remain during the said day, and during the night time of the said day, wholly uncovered and unguarded, and without any sign or warning of danger to the persons passing along the said street.

By means and in consequence of which said negligence and improper conduct of the said defendant in that respect, afterwards, to wit: on the day and year aforesaid, between the hours of seven and nine o'clock in the evening of the said day, to wit: at the county aforesaid, one William H. Woodbury, then and there, in the exercise of ordinary care and prudence for his personal safety, lawfully going and passing over said street, fell and was violently thrown into the said pit or hole, and was then and there greatly injured and damaged thereby, and then and there, by reason of the premises, the said William H. Woodbury became sick, sore and lame, and was obliged to expend large sums of money in endeavoring to be cured of the said wounds and injuries received as aforesaid, to wit: the sum of one hundred dollars, and by reason of the premises, the said William H. Woodbury was prevented from performing and transacting his lawful affairs, to be by him performed and transacted, and was otherwise greatly injured and damaged thereby, and in order to obtain compensation for the injuries and damages so sustained by the said William H. Woodbury as aforesaid, and which were so as aforesaid occasioned by the negligence and improper conduct of

the said defendant, he, the said William H. Woodbury, at a term of this honorable Court, begun and holden at Chicago, in the county aforesaid, on the first Monday in February, A. D., 1857, caused an action at law to be brought against the said plaintiff in the said Court, and such proceedings were thereupon had that afterwards, to wit: at the June special term of the said Court in the same year, it was adjudged by the said Court that the said William H. Woodbury should recover against the said plaintiff for his damages by him sustained in the premises, the sum of fifteen thousand dollars and twenty-two dollars and twenty-five cents for his costs and charges by him about his suit in that behalf expended, whereof the said plaintiff was convicted, as by the record and proceedings thereof more fully appear, and upon which said judgment, an execution by writ of fieri facias, was afterwards, to wit: on the thirteenth day of July, A. D., 1857, at the county aforesaid, issued against the said plaintiff by the said William H. Woodbury, directed to the Sheriff of the county of Cook aforesaid, whereby the said Sheriff was commanded that of the lands and tenements, goods and chattels of the said city of Chicago, he should cause to be levied the damages and costs aforesaid, and that he should have those monies ready to render to the said William H. Woodbury for his said damages and costs, and make return of the said writ, with an endorsement thereon, in what manner he should have executed the same, in ninety days from the date thereof, which said writ, before the delivery thereof to the said Sheriff, was duly indorsed, and was afterwards, to wit: on the day and year last aforesaid, at the county aforesaid, delivered to the said Sheriff to be executed in due form of law. By virtue of which said writ, the said Sheriff afterwards and before the return of the said writ, to wit: on the day and year last aforesaid, at the county aforesaid, seized and took in execution divers goods and chattels, lands and tenements of the said plaintiff of great value, to wit: of the value of the monies indorsed on the said writ and directed to be levied as aforesaid, by means of which said several premises, the said plaintiff was not only forced and obliged to pay, and did necessarily pay to the said William H. Woodbury, the said several sums of money, fifteen thousand dollars and twenty-two dollars and twenty-five cents, but were also forced and obliged to pay, and did necessarily pay, the sum of sixty-four dollars and ninety-nine cents for interest on the said sum of fifteen thousand dollars, and the sum of one hundred and eight dollars and seventy cents for Sheriff's fees on the said execution so as aforesaid issued by the said William H. Woodbury on the said judgment, and was also forced and obliged to expend, and did necessarily expend, divers other sums of money in and about defending the said suit and proceed-

ings of the said William H. Woodbury, in the whole amounting (exclusively of the said sums of fifteen thousand dollars and twenty-two dollars and twenty-five cents) to a large sum of money, to wit: the sum of five thousand dollars, and was and is, by means of the premises, otherwise greatly injured and damnified, to wit, at the county aforesaid.

And also for that, whereas, the said plaintiff is a body corporate established and existing under the laws of the State of Illinois, and having by its charter exclusive power over the public streets of the city of Chicago, in the county aforesaid, and it being the duty of the said plaintiff to remove and abate any nuisances and obstructions on the said streets, to control, regulate, and repair the same and to protect the same from any encroachment or injury. And whereas, the said defendant before and at the time of committing the grievance hereinafter next mentioned, was possessed of a certain building with the appurtenances, situate and being in a certain street in the said city and county called Wells street, which said street at the time of the committing of the said grievance and fraud, thence hitherto has been, and still is, one of the public streets of the said city of Chicago, for all persons to go, return, pass, and repass, at their free will and pleasure; to wit, at the county aforesaid, that the said defendant, well knowing the premises whilst he was possessed of said building with the appurtenances as aforesaid, to wit: on the twenty-eighth day of December, A. D., 1856, at the county aforesaid, wrongfully and unjustly dug, opened and made in the said street on the eastern side thereof, next to and adjoining the said building, a large pit or hole of great length, width and depth, to wit: of the length of one hundred feet, of the width of four feet, and of the depth of fifteen feet, and wrongfully and injuriously suffered the said pit or hole to remain during the said day and during the night time of the said day wholly uncovered and unguarded, and without any sign or warning of danger to the persons passing along the said street. By means and in consequence of which said negligence and improper conduct by the said defendant in that respect, afterwards, to wit: on the said twenty-eighth day of December, A. D., 1856, between the hours of seven and nine o'clock in the evening of the said day, to wit: at the county aforesaid, one William H. Woodbury, then and there in the the exercise of ordinary care and prudence for his personal safety, lawfully going and passing over the said street, fell, and was violently thrown into the said pit or hole; and was then and there greatly injured and damaged thereby, and then and there, by reason of the premises, the said William H. Woodbury, became sick, sore and lame, and was obliged to expend large sums of money in endeavoring to be cured of the said wounds and

injuries received as aforesaid, to wit: the sum of one hundred dollars, and, by reason of the premises, the said William H. Woodbury was prevented from performing and transacting his lawful affairs to be by him performed and transacted, and was otherwise greatly injured and damaged thereby, and in order to obtain compensation for the injuries and damages so sustained by the said William H. Woodbury, as aforesaid, and which were so, as aforesaid, occasioned by the negligence and improper conduct of the said defendant, he, the said William H. Woodbury, at a term of this honorable Court, begun and holden at Chicago, in the county aforesaid, on the first Monday in February, A. D., 1857, caused an action at law to be brought against the said plaintiff in the said Court, and the said plaintiff avers that due notice was given by the said plaintiff to the said defendant of the pendency of the said suit, with the option of defending the same, if he should think fit so to do, but the said defendant neglected and refused to defend the said suit, and the said plaintiff thereupon caused the same to be defended with due and proper care, skill and diligence.

And the said plaintiff further says that such proceedings were had in the said suit, that afterwards, to wit: at the June Special Term of the said Court in the same year it was adjudged by the said Court that the said William H. Woodbury should recover against the said plaintiff for his damages by him sustained in the premises, the sum of fifteen thousand dollars and twenty-two dollars and twenty-five cents for his costs and charges by him about his suit in that behalf expended, whereof the said plaintiff was convicted as by the record and proceedings thereof more fully appear, and upon which said judgment, an execution by writ of fieri facias was afterwards, to wit: on the 13th day of July, A. D., 1857, at the county aforesaid, issued against the said plaintiff by the said William H. Woodbury, directed to the Sheriff of the county of Cook aforesaid, whereby the said Sheriff was commanded that of the lands and tenements, goods and chattels of the said city of Chicago, he should cause to be levied the damages and costs aforesaid, and that he should have those moneys ready to render to the said William H. Woodbury for his said damages and costs, and make return of the said writ with an indorsement thereon in what manner he should have executed the same, in ninety days from the date thereof, which said writ, before the delivery thereof to the said Sheriff, was duly endorsed and was afterwards, to wit: on the day and year last aforesaid, at the county aforesaid, delivered to the said Sheriff to be executed in due form of law. By virtue of which said writ the said Sheriff afterwards and before the return of the said writ, to wit: on the day and year last aforesaid, at the county aforesaid,

seized and took in execution divers goods and chattels, lands and tenements of the said plaintiff of great value, to wit: of the value of the monies indorsed on the said writ and directed to be levied as aforesaid. By means of which said several premises, the said plaintiff was not only forced, and obliged to pay, and did necessarily pay to the said Wm. H. Woodbury, the said several sums of fifteen thousand dollars and twenty-two dollars and twenty-five cents; but was also forced and obliged to pay, and did necessarily pay the sum of sixty-four dollars and ninety-nine cents for interest on the said sum of fifteen thousand dollars, and the further sum of one hundred and eight dollars and ninety cents for Sheriff's fees on the said execution so as aforesaid issued by the said Wm. H. Woodbury on the said judgment, and was also forced and obliged to expend, and did necessarily expend divers other sums of money in and about defending the said suit and proceeding of the said Wm. H. Woodbury, in the whole amounting (exclusively of the said sums of fifteen thousand dollars and twenty-two dollars and twenty-five dollars) in a large sum of money, to wit: the sum of five thousand dollars, and was, and is, by reason and means of the premises otherwise greatly injured and damnified, to wit: at the county aforesaid, to the damage of the said plaintiff of twenty-five thousand dollars, and therefore it brings this suit.

JOHN C. MILLER,
Plaintiff's Attorney.

Endorsed.
Filed March 1st, 1858.
WM. H. BRADLEY,
Clerk.

Exhibit "C."

In the Court of Common Pleas for the County of Cook, in the State of Illinois, February Term, A. D., 1858.

ALLEN ROBBINS,
vs.
THE CITY OF CHICAGO.

To the Honorable the Cook County Court of Common Pleas:

Respectfully represents Allen Robbins, defendant in the above entitled suit, that the said suit is an action of trespass on the case, commenced against him in the said Cook County Court of Common Pleas, by the City of Chicago, a body corporate, established and existing within the county of Cook, and State of Illinois, under the laws of said State, that your petitioner, the defendant, is not a citizen of the State of Illinois, but is a citizen of the State of New York, and that the matter in dispute in said suit exceeds the sum of five hundred dollars, exclusive of cost.

Your petitioner therefore prays that the said cause may be removed for trial into the next United States Circuit Court, to be held in the Northern District of Illinois, which Court is to be holden on the first Monday in March, A. D., 1858, and he hereby offers to this Honorable Court good and sufficient security for his entering in said United States Circuit Court, on the first day of its session, copies of said process against him, and for entering then and there his appearance in said suit, according to the act of Congress in such case made and provided, and your petitioner will ever pray, &c.

ALLEN ROBBINS,
By his attorneys, STUART & AYER.

State of Illinois, Cook County, *ss.*

Allen Robbins, the petitioner named in the foregoing petition, being first duly sworn, deposes and says, that the facts stated in the foregoing petition are true.

ALLEN ROBBINS.

Subscribed and sworn to by the said Allen Robbins, this tenth day of February, A. D., 1858, before me.

WALTER KIMBALL,
Clerk.

Endorsed.
Filed March 1st, 1858.
WM. H. BRADLEY,
Clerk.

Exhibit "D."

Know all men by these presents, that we, Allen Robbins, of the city, county and State of New York, and David Stuart and Benjamin F. Ayer, both of Chicago, in the County of Cook, and State of Illinois, are held and firmly bound unto the city of Chicago, a body corporate and politic, established and existing within the County of Cook, and State of Illinois, under the laws of said State, in the sum of twenty-five thousand dollars, to be paid to the said city of Chicago, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators firmly by these presents.

Sealed with our seals, and dated the tenth day of February, A. D., 1858.

The condition of the above obligation is such that, whereas, the above named Allen Robbins has filed his petition in the Court of Common Pleas of the county of Cook, and State of Illinois,

praying for the removal of a certain cause, pending in said Court, in which the City of Chicago aforesaid is plaintiff, and the said Allen Robbins is defendant, for trial into the United States Circuit Court, to be held in the Northern District of Illinois, according to the act of Congress in such case made and provided.

Now, if the said Allen Robbins shall enter, or cause to be entered in the said United States Circuit Court, on the first day of the next term of said Court, copies of such process as hath been issued against him in the said Cook County Court of Common Pleas, in the action aforesaid, and if he shall enter his appearance in the said suit in the said United States Circuit Court, on the first day of the next term of said Court, then this obligation shall be void, otherwise to be and remain in full force and virtue.

ALLEN ROBBINS, [SEAL.]
DANIEL STUART, [SEAL.]
B. F. AYER, [SEAL.]

Endorsed.

Filed February 11th, 1858.

WM. H. BRADLEY,
Clerk.

And this day, to wit: the first day of March, in the year of our Lord one thousand eight hundred and fifty-eight, came the said defendant, by Messrs. Stuart and Ayer, his attorneys, and filed in the Office of the Clerk of the Circuit Court of the United States for the Northern District of Illinois, and filed his pleas herein, which said pleas is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT,
For the Northern District of Illinois.

The March Term, 1858.

ALLEN ROBBINS,
vs.
THE CITY OF CHICAGO.

And the said defendant, by Stuart & Ayer, his attorneys, comes and defends the wrong and injury, when, &c., and says, that he is not guilty of the said supposed grievances above laid to his charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him, and of this, he, the said defendant, puts himself upon the country, &c.

STUART & AYER,
Attorneys for the Defendant.

And the plaintiff doth the like.

GEORGE F. CROCKER,
Plffs. Attorneys.

And the said defendant, by leave of the Court here for that purpose first had and obtained, for further plea in this behalf saith, that the plaintiff, its action aforesaid, thereof against him, ought not to have or maintain, because he saith, that he did not dig, open or make in the said street and highway, the said pit or hole in the said declaration mentioned, in manner and form as the said plaintiff hath above thereof complained against him, and of this, he, the said defendant, puts himself upon the country.

By his attorneys, STUART & AYER.

Endorsed.
Filed, March 1st, 1858.
WM. H. BRADLEY,
Clerk.

And this day, to wit: the eighth day of October, in the year of our Lord one thousand eight hundred and fifty-nine, came the said plaintiff, by George F. Crocker, Esq., its attorney, and filed in the Office of the Clerk of the Circuit Court of the United States for the Northern District of Illinois, and filed its demure to the second plea of the aforesaid defendant, which said demurrer is in the words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Illinois.

THE CITY OF CHICAGO,
vs.
ALLEN ROBBINS.

And now comes the said plaintiff and as to the said plea of said defendant above by him secondly pleaded, saith that said plea is not sufficient in law to bar or preclude said plaintiff from having its said action against said defendant, and for causes of demurrer shows that the said plea, amounts to and is the same as the general issue, and this is ready to verify.

Whereupon said plaintiff prays judgment, &c.

GEORGE F. CROCKER,
Plaintiff's Attorney.

Endorsed.
Filed October 8th, 1859.
WM. H. BRADLEY,
Clerk.

And the same day, to wit: the eighth day of October, A. D., 1859, in the record of the proceedings of said Court in said cause, is the following entry, to wit:

THE CITY OF CHICAGO, *vs.* ALLEN ROBBINS. } Trespass.

Now come the parties by their attorneys, and the defendant by his attorney, withdraws his second plea herein, and upon issue joined thereupon, came a jury of good and lawful men, to wit: E. W. Brewster, Warren Nye, Nelson Mason, D. O. B. Adams, J. S. Gardner, William F. Cady, Isaac N. Van Hosen, Charles W. Waterburg, Frederick Tupper, Charles Sissen, D. F. Carpenter and E. B. Kingsley, who were duly elected, tried and sworn well and truly to try said issue, and after hearing a part of the evidence, the hour of adjournment having arrived, the further hearing herein is postponed until Monday morning next.

And this day, to wit: the tenth day of October, A. D. 1859, in the record of the proceedings of said Court in said entitled cause, is the following entry, to wit:

THE CITY OF CHICAGO, *vs.* ALLEN ROBBINS. } Trespass.

Now come again the parties by their attorneys, and come also the jury, who were heretofore empanneled in this cause, and after proceeding in the trial until the hour of adjournment, the further trial is postponed until to-morrow morning.

And this day, to wit: the 11th day of October, A. D., 1859, in the record of the proceedings of said Court in said entitled cause, is the following entry, to wit:

THE CITY OF CHICAGO, *vs.* ALLEN ROBBINS. } Trespass.

Now come the parties by their attorneys, and now come also the jury heretofore empanneled in this cause, and after concluding the evidence and arguments of counsel, the hour of adjournment having arrived, the instructions of the Court to the jury are postponed until to-morrow morning.

And this day, to wit: the 12th day of October, A. D., 1859, in the record of the proceedings of said Court in said entitled cause, is the following entry, to wit:

THE CITY OF CHICAGO,
vs.
ALLEN ROBBINS. } Trespass.

Now come again the parties by their attorneys, and now come also the jury heretofore empanneled herein, and after receiving instructions from the Court, the jury retire to consider of their verdict.

And this day, to wit: the thirteenth day of October, A. D., 1859, in the record of the proceedings of said Court in said entitled cause, is the following entry, to wit:

THE CITY OF CHICAGO,
vs.
ALLEN ROBBINS. } Trespass.

The jury herein having been this day returned into Court, and reporting that they were unable to agree upon a verdict, it is ordered by the Court that they be discharged.

And this day, to wit: the sixth day of April, A. D., 1860, in the record of the proceedings of said Court in said entitled cause, is the following entry, to wit:

THE CITY OF CHICAGO,
vs.
ALLEN ROBBINS. } Trespass.

Now come the parties by their respective attorneys, and upon issued joined thereupon, come a jury, of good and lawful men, to wit: John Strean, Samuel Thomas, Chester D. Bartlett, Samuel Waugh, A. J. Cronise, Joseph Gay, Henry L. Fuller, William V. Plum, Isaac De Lane, R. Wheeler, J. C. Adams and S. W. Kenig, who were duly elected, tried and sworn well and truly to try said issue, and after hearng a part of the evidence, the hour of adjournment having arrived, the further hearing is postponed until to-morrow morning.

And this day, to wit: the seventh day of April, A. D., 1860, in the record of the proceedings of said Court in said entitled cause is the following entry, to wit:

THE CITY OF CHICAGO,
vs.
ALLEN ROBBINS. } Trespass.

Now come again the parties by their attorneys, and now come also the jury heretofore empanelled in this cause, and after hearing the concluding evidence and a part of the arguments of counsel, the hour of adjournment having arrived, the further hearing is postponed until Monday morning next.

And this day, to wit: the ninth day of April, A. D., 1860, in the record of the proceedings of said Court in said entitled cause, is the following entry, to wit:

THE CITY OF CHICAGO,
vs.
ALLEN ROBBINS. } Trespass.

Now come again the parties by their attorneys, and come also the jury heretofore empanneled in this cause, and after hearing the concluding arguments of counsel and receiving instructions from the Court, the jury to consider of their verdict, and by agreement of the parties by their attorneys, it is ordered by the Court, that the jury, when they may have agreed upon a verdict, shall sign and seal the same, and deliver the same to the Clerk, and dispense and meet the Court to-morrow morning.

And this day, to wit: the tenth day of April, A. D., 1860, in the record of the proceedings of said Court, in said entitled cause, is the following entry, to wit:

THE CITY OF CHICAGO,
vs.
ALLEN ROBBINS. } Trespass.

Now came again the parties by their attorneys, and now come also the jury heretofore empanneled in this cause, and return into Court the following verdict, to wit: "We, the jury, find the defendant not guilty." Whereupon the plaintiff, by its attorney, moves the Court for a new trial herein.

And this day, to wit: the twenty-fourth day of May, A. D., 1860, in the record of the proceedings of said Court, in said entitled cause, is the following entry, to wit:

THE CITY OF CHICAGO,
vs.
ALLEN ROBBINS. } Trespass.

Now comes on to be heard the motion of the plaintiff, heretofore made herein, for a new trial of this cause, and after hearing the argument on the part of the plaintiff, the Court takes the same under advisement.

And this day, to wit: the twenty-sixth day of May, A. D., 1860, in the record of the proceedings of said Court, in said entitled cause, is the following entry, to wit:

THE CITY OF CHICAGO,
vs.
ALLEN ROBBINS. } Trespass.

Now comes on again to be heard the motion of the plaintiff for a new trial of this cause, and after hearing further argument of counsel, the Court takes time to consider.

And this day, to wit: the twenty-eighth day of May, A. D., 1860, in the record of the proceedings of said Court in said entitled cause, is the following entry, to wit:

THE CITY OF CHICAGO,
vs.
ALLEN ROBBINS. } Trespass.

The Court, having fully considered, and being now fully advised upon the motion of the plaintiff for a new trial herein, overrules said motion. It is therefore considered and adjudged by the Court that the defendant have and recover of the plaintiff his costs, by him about his defence in this behalf expended, amounting to the sum of twenty-seven dollars and sixty-nine cents, and that he have execution therefor.

United States Circuit Court for the Northern District of Illinois.

CITY OF CHICAGO,
vs.
ALLEN ROBBINS.

Be it known, that this trial came on to be heard before the Hon. Thomas Drummond, Judge of the United States Court for the Northern District of the State of Illinois, and that at the commencement of said trial it was admitted by the said defendant, Allen Robbins, that he was the owner of the lot upon which the building in question was erected, which is situated in the city of Chicago, at the corner of Wells and South Water street, and that he caused the said building to be erected under a contract. This fact being admitted, the plaintiff then produced as a witness, G. W. Darron, who testified that he was the Deputy Clerk in the office of the Superior Court of the city of Chicago which Court was formerly called the Cook County Court of Com mon Pleas. Said witness then produced the files of the Court in the suit of William H. Woodbury, *vs.* The City of Chicago, by which files and also the records of said Court, and record of the Court, it appeared that the summons in said suit was issued in behalf of said Woodbury against the City in an action of trespass on the case, on the 22d day of June, 1857; that the case was

tried in said Cook County Court of Common Pleas, now the Superior of Chicago, and the verdict of the Jury was rendered in said Court April 18th, 1857, for the sum of $15,000; that a motion for a new trial was entered and was overruled June 24th, 1857, and judgment rendered upon the verdict on said 24th day of June, 1857, for $15,000 damages, and $20.15 costs. Execution was issued July 13th, 1857, for the amount of the judgment, interest and costs, which amounted in all (to $15,195.$\frac{14}{100}$) fifteen thousand one hundred and ninety-five dollars and fourteen cents, and which had been paid by the city of Chicago.

The following is a pretty full abstract of the evidence in the case:

M. M. Gillespie, sworn.

Reside in Chicago. Have resided here since February, 1856. In 1856 I was in Gibbs & Griffith's warehouse, on the north side, during the fall and winter. I boarded then at No. 195 Washington street. I had to cross the Wells st. Bridge to go to the warehouse. I knew Wm. H. Woodbury. I know the iron building, corner of Wells street and Water street. It was erected in summer of 1856. I used to pass there 2, 3 or 4 times a day. I first saw Woodbury on the west side of Wells street bridge. He was coming across from the north to south side. I was walking 3 or 4 rods behind him, going the same way. It was in December, 1856, in the evening, between 8 and 9 o'clock. It was on Sunday evening. It was cold and it snowed. He came across on the west side of the bridge and then crossed over to the south-east corner of Wells and S. Water streets. I saw him going ahead of me. I looked down a moment and he was gone. I last saw him near the corner of the building, and going south. I supposed that he had fallen into the area. I ran up to where he was. He hollered for help; I went for a ladder and got him out. The side-walk was laid with flag-stones. They had laid grates across the area, between the flagging and building for 18 or 20 feet, level with the side-walk; a space was open where the grates ended all the way; I think to the end of the building. The excavation was about 8 feet deep, 7 or 8, may be more. I got him out on to the side-walk. He said he felt faint. I went with him along to the corner of Wells and Lake street, when he said he felt better. I offered to go home with him. He said no, he could go home alone. I never saw him before. I did see him afterwards two or three times. I saw him at the Tremont House on the day after the trial of his case took place and saw him again last fall; I saw him at Mr. Wilkinson's office previous to the trial.

Cross-examination.

I saw him as he went on to the side-walk. He was facing the storm. Did not see him walk backwards; could not say whether the lamps on the bridge were lighted, but I think they must have been. There was a lamp on the west side of Wells st., at the corner of the alley. I saw him down in the area. I think if I was looking at it I could see the open area, although if a man did not know about it, it might be difficult to see the hole. There was some snow on the grates; not much had fallen, and it was blowing about. After he got to the corner, he said he felt better, and could go home alone. He said he didn't think he was much hurt. I saw him once at Wilkinson's office before the trial. Hand-bills were put out for those who helped him out. When I first saw him at the office, he came to the office. I once saw him in bed at the Tremont House, and at another time sitting up in a chair. I saw him last fall again, at the Richmond House. He informed me he was a lawyer. He appeared then to be well.

John M. Van Osdell, sworn.

I am an architect. I know the building at the corner of Wells and S. Water sts. I superintended its erection for Mr. Robbins. I prepared the plans; have the plan of the basement story here. Exhibits the plan. These plans were adopted by Robbins. Some slight change in the area from that plan—it called for the excavation in the side-walk and the area; the building was on the line of his lot on Water and Wells st., as given us by the Surveyor. The building is 150 feet on Wells st. In addition to furnishing plans, &c., I superintended the erection of the building; commenced excavations 1st April, 1856; on 28th Dec., 1856, the building externally was nearly finished; it was enclosed; the gratings of the area were not complete. The building was erected for Robbins: gave him the certificate for payment. Saw Robbins at the building occasionally during the whole summer. He was aware that excavations were to be made in the side-walk, and was there while the excavations were going on.

Cross-examination.

The width of side-walk, including area, is 16 feet wide. The area is 4 feet 10 wide. Under the flagging are coal vaults. The area is for light and access to basement; it is covered with prismatic plates, except where steps descend. Has been architect here 15 years; erected 5 or 6 hundred buildings; have been in the practice forty years past of excavating these side-walks for

vaults and areas; the first was the McCardell house. Before the change of grade it was not customary to construct cellars; we had none; since the grade has been raised, we have.

Have you ever known of any special permits or authority taken out to construct these vaults or areas?

Answer. Have not.

There have been constructed in Chicago within the last six years, of buildings which have these areas, before this building was concluded, 2,000 lineal feet that year. After the amendment of the ordinance the areas were 5 feet. No permits since ever been taken out. Bouton, while he was City Superintendant, covered a number of these areas with grating—it was in the line of his business; never knew of any objection on the part of any of the city officers. The fact was known to members of the Council; no objection made in this instance by any city officials. The grade of Wells street was changed; we were ordered to raise the sidewalk 8 inches higher than it was first to accomodate it to the grade of the street; it was raised in July or 1st August; the flagging was laid some time in August. Peter Button had the contract for the mason work. This is the contract. The building was constructed by Mr. Button under this contract; it was never abandoned. They commenced early in the spring; it was not finished in September; the work was delayed some nearly three months in the summer by the iron fronts. Button's work was not done till into February. When the accident happened the work was not finished; the areas were not finished; the floors—a contract was made with Mr. Letts for the iron gratings; it was in my charge, and stolen, I think, from my office. The contract was the same blank with this, and think it contained the same clause about liability as this, because Mr. R. was very particular about that. After the flagging was on, the area was covered; the men had to use it in getting up their iron work to rest their derrick upon.

Paper shown was a certificate made out by me some time in the winter.

Re-examined by Hervey.

Superintended the erection of the building for Robbins, who paid me. Mr. Robbins directed me as to raising the sidewalk to the grade.

Mr. Button had nothing to do with putting on the iron grating. There were some 7 different contractors on the building, in all, on different parts of the work.

Elihu Granger.

Was City Superintendent, 1856; passed here 2 or 3 times a a day on my way home; knows Mr. Robbins; I saw Mr. R. occa-

sionally, not very often, about there when the building was being erected; the flagging was laid down as early as September perhaps, or it may have been as late as November. There was an area 4 to 5 feet next the building after the sidewalk was laid. I had conversations with R. about every time I met him there; my impression is, I had one with him after the flagging was laid, about the area, as to how it could be covered; I think I said that it ought to be covered up with sticks across and plank on the sticks, and I think it was done, to some extent, and perhaps wholly, after that—I think, while they were at work there; they opened it when they were putting on the iron grating. I considered it my duty, as City Superintendent, to warn him against any accident that could happen. I took no other measures than what I have told—no knowledge of its being covered by the city or its authority. After I spoke of it, it was done by the workmen or the contractor, from what they told me. My clerk was Elias Shipman, my foreman was Heish. I don't recollect as I ever gave Mr. Shipman any order to notify Mr. Robbins of the danger of the area; I have no recollection of giving any such order; it was frequently the case. Do not recollect doing anything to the area, but before the flagging was being put on I sometimes, passing there, re-placed a plank which would get displaced and expose a hole. When I directed R.'s attention to the condition of the area, I said I thought it ought to be covered up, and suggested the mode in which it should be done. I have no recollection of doing anything to protect the area, or with Shipman for the city; remember nothing more. I think I said to R. that if it was sleety and people were passing rapidly—they might slip *in*—that somebody's neck would be broken if the covering were not attended to, and he said he would attend to it. Mr. Robbins said the matter was all in the hands of his contractor—that it belonged to him, and that he would speak to him about it, something to that effect. I spoke to him as City Superintendent, *as I had frequently before.* During the summer I was there considerably, regulating the approach to Wells street bridge; I was there and he was there more at that time. It was after the flagging was laid that I spoke of the area. There was or had been ice on the flagging, and that attracted my attention to the circumstances.

Cross-examination.

My duties were the general superintendence of public works; establishment of grades that year was put into my hands. I had a Surveyor, and the responsibility was on me. The ordinance then established the grade it described towards the corner of the block, and would have to be discharged in a cesspool at that cor-

ner; it was ordered to raise that corner and drain the water; the alley, the approach to the bridge, required that the side walk had to be raised 8 inches. Dr. Boone was Mayor in 1855. I don't remember how early I knew who was contractor. This is a *permit* granted by Boone, Mayor. Most of my conversations with R. were about the grade. Had no recollection of but one about the area. My impression is that Wm. Shipman was then there; we were on the flagging, as I think. I suggested the same thing to Button. I think he said he would attend to it. I told him that I had spoken to R., and that he had referred him to M. B., and Button admitted it was so.

My best impression is, that it was covered after I spoke of it till the iron men came and took it up to lay down the grating. I saw the work and excavation all the time, every day; never objected to it, for considered it absolutely necessary. I never objected in any case while superintendent to works of this character.

The Mayor and City Council knew of these works. I was in the council the year before; never knew of any permit being given except similar to this one to Button.

(Referring to a permit to Peter S. Button of February 25, 1856, to occupy one-half of Wells street, and outer half of sidewalk, and not to extend beyond four months.)

Gillespie re-called.

The men were there working next morning I thought, at the grates.

Joshua Marsh.

Was City Attorney in 1856. Suit of Woodbury commenced and was concluded after my term of office. I made preparation for the defence of the suit. I ascertained that R. was owner of the building, and called on him to assist me in the procuring of evidence. He told me of a witness, Ledington, who knew something of the suit. We were talking of the suit. He told me Ledingston was not in the city at that time, but he would write to him and see what he did know. He told me afterwards that he had written him. I found the case could not be tried till after my term of office. The evening before the trial, I casually met Mr. R. and told him the case was to be tried the next morning. I did not go to notify him, but casually met him.

Cross-examination.

My term expired March, 1857. I never called on Mr. R. to defend the suit. I merely went to Mr. R. to see if he knew any-

thing about the facts, to enable me to prepare the defence for the city. Never notified him that the city would look to him for indemnity.

Elias Shipman, sworn.

Resided here in 1856; head clerk in Granger's office; knew R. by sight and the buildings; lived with Granger on north side; passed the premises four times, and usually six times a day. The flagging on Wells street was commenced at east end some time in September, may be a little later; it was completed about 1st November, I think on both fronts. The area was usually entirely open until after the grating was all done. Some time after the flagging was done and before the concrete floor of area was laid, I was present at a conversation with Granger and R. exactly at corner of building, N. W. corner of building. Granger spoke about the danger of the area being open; that it was dangerous. Don't pretend to speak with accuracy as to the language. Somebody's neck or limb would be broken or paid for. The substance was, that R. said, "That he would see to it." By direction of Mr. Granger, *before this*, I wrote him a note and put it in the post-office, notifying him of the danger of the area. I recollect Mr. G. and myself picking up plank there and putting it across the end at corner; have pretty distinct recollection of doing it more than once; found them afterwards removed: there used to be gang-plank running from sidewalk to building. I don't remember ever seeing the area covered till it was covered by grating.

I was not in the city at the time of the accident. I saw the defendant frequently, and presume he was in the city while the building was being built.

Cross-examination.

I have no precise recollection when the flagging was finished. The area had been left open as they finished the flagging all along. It was open till after the accident. Have a recollection of putting it over more than once. Testified before that the area had been left open more or less for a week or two. The conversation must have been late in November. Never heard but the one conversation with G. and Robbins. The notice was sent 2 or 3 weeks before this—perhaps before the flagging was laid. The notice had reference to the whole front, not the area particularly. The area was not covered, to my recollection, properly. I think very likely there were barriers up part of the time. I have no recollection of putting up barriers after the conversation. I know that barriers are frequently stolen and carried away at night. I think the steps to the area were not finished at time of conversation. Lamps at bridges, and lamp at alley, 64 feet from the building.

Re-examination.

Never knew of any barriers being put up; think the flagging was not all down when I sent the notice.

Defendant's Testimony.

Contract of Feb. 20, 1856, with Button, read, and is in the words and figures following.

Articles of agreement made and entered into the twentieth day of February, one thousand eight hundred and fifty-six, by and between Peter Button, mason and builder, of the city of Chicago, in the county of Cook and State of Illinois, party of the first part, and Allen Robbins, of the city of New York, party of the second part, Witnesseth, that said first party agrees to and with said second party, for and in consideration of a certain sum of money hereinafter mentioned, to do all the brick-work, stone-work, lathing and plastering, concrete floors and all grouting and excavating anchors, and lash in joints, puddling tubes and thimbles; to set iron eyes and other anchors, lintels, &c., and do all other work as set forth in masons' specification, and furnish all necessary materials to complete the same; the entire work to be completed done and finished in accordance with the drawings and specifications made and prepared for said block of buildings by Van Osdel & Baumann, architects, which drawings and specifications being signed by the parties to this agreement, are to be considered as forming part of the same, the whole to be completed at the time specified.

And it is further agreed that time is the essence of this agreement, as hereinafter mentioned. In consideration of such buildings being well and truly done in the time specified, and the work and materials being of the kind and quality mentioned and shown in said specifications and drawings, said second party agree to pay the said first party or his legal representatives, the sum of twenty-one thousand, two hundred and eighty-one dollars, in payments as the work progresses, fifteen per cent. to be retained on each estimate until the whole is completed. It is further agreed between the parties hereto, that should said Robbins elect to omit the concrete floors of cellars, the sum of eight hundred and fourteen dollars shall be deducted from the sum first above mentioned, and should said Robbins elect to omit the concrete floors of vaults, a further sum of one-hundred and ninety-one dollars shall be deducted. It is agreed that said party of the first part may have possession of the ground on the first day of April next, the building to be ready for 1st floor on or before the fifteenth day of May next, and ready for 2d floor on or before the

first of June next, and ready for 4th floor on or before first of July next, to be topped out on the 1st of August next, and finished on the 1st day of September next. And it is further agreed by and between the parties hereto, and distinctly understood, that the specifications and drawings hereinbefore mentioned, are intended to co-operate, so that any work exhibited in the drawings and not mentioned in the specifications, or vice versa, are to be executed the same as if it were mentioned in the specifications and set forth in the drawings, to the true meaning and intention of the said drawings and specifications. It is further agreed that should said second party, at any time during the progress of the work, request any minor alterations, deviations, additions or omissions to the plan of construction or finishing said building, he shall be at liberty to have such minor alterations, additions or omissions made by giving said party notice of the same in writing, and the same shall in no way affect or make void this agreement, but the cost of such alterations shall be added to or deducted from the consideration hereinbefore mentioned, as the case may be, by a fair and reasonable valuation. Should any dispute arise between said first party and the superintendent of the work respecting the true construction or meaning of the drawings and specifications, the same shall be decided by said first party choosing a disinterested competent person to consult with said superintendent. If such person and the superintendent disagree, they shall jointly choose an umpire, and their decision, by *by* majority, shall be final. It is further agreed that said second party shall not, in any manner, be answerable or accountable for any loss or damage that shall or may happen to the said work or any part thereof, or for any of the materials or other things used and employed in finishing and completing the same, (loss or damage by fire excepted,) said first party to be liable for any violation of city ordinances in obstructing streets or sidewalks, or accidents resulting from the same.

In testimony of which, witness our hands and seals the day and year first above mentioned.

PETER BUTTON, [SEAL.]
ALLEN ROBBINS, [SEAL.]

John H. Sendlebeck sworn.

I was foreman of Mr. Button, the contractor. The flagging was laid some time in the fall; Cook & Co., laid the flagging. We dug the area early in the Spring, and then covered it all up in with joists. The iron men then came on from New York, and did their work; we had the whole space covered snug up to the building. The iron men had their derrick standing on these

joists. After they put up part of the iron work, Cook came on and laid the flagging. He took up part of the joists, as he wanted to lay the flagging. After the flagging was finished, the area was left open; at the corner a stone was put in flush up to the building; that was put in just as soon as the flagging was finished; I put it in. The area extended under this stone. The area was covered with joists, as the whole space had been before the flagging was laid. These joists had to be placed there, to enable them to put on the iron cornice and shutters. I could not say it was kept covered all the time. When the iron men came on to put on the grates they removed the joists; occasionally a joist was removed as the carpenters wanted to use it, but it was afterwards replaced. I acted under Mr. Button's orders. Mr. Granger once spoke to me about it; he said we must keep it covered, or Button would be liable, or the owner would; I presume there were some places open when Granger spoke to me; perhaps some joists had been removed. After the iron men came there to do their work, I don't know how the work was. They put up a railing while they were doing their work; the joists were removed to enable them to drill their holes for the railing. The railing was afterwards removed, and gratings substituted. The area was all covered until the grating men came there, with the exception that a joist might occasionally be removed.

Cross-examined.

The area was flagged, I think, before the iron men came to put on the grating. I don't recollect that Granger spoke to me more than once or twice about covering the place up. I know Button spoke to me several times about it. I don't know that they spoke to me very often. I don't know anything about the area after the iron men came there, for it was their duty to look after that matter.

Col. Speed sworn.

I was contractor in 1856, under Sewerage Coms. I laid sewers on South side and on Wells street. I went to Robbins to get a contract with him; he said he had nothing to do with it. I was there from November to December. The street was all hurly burly arrangements for putting down Nicholson pavement; street not used. The flagging was down, and it was the only place to mix cement. Asked permission of R.; he said, he had nothing at all to do with it; referred me to some gentleman who gave me permission. The area was kept covered—with plank and joist it was protected; sometimes they took my planks, and when I wanted them I took them; there were barrels there, and barriers. The building was unfurnished.

Cross-examined.

I finished work there in December, some time. don't know as to the condition of the side-walk after I stopped work there. The iron men were there putting up the iron railing.

For Plaintiff.

A. B. Cook sworn.

Had a contract with Robbins for the flagging. I laid it when I went to commence the flagging; there was a covering over side-walk and area; as fast as we covered it with flagging, Mr. Butto n went on and covered it over again as it was before.

Van Osdell re-called by defence.

My duty as Superintendent or architect was to see that the work was done according to contract—to see that the work and material was according to specification, and make estimates.

Cross-examination.

Gave certificates of the work for payment; had superintendence of all the *work* done over the building. If any insufficient work or material was done or used. I had authority to require the contractor to do it as it ought to be done.

Counsel for defendant then introduced, in evidence, the following provision of the ordinances of the city of Chicago, viz:

"ARTICLE II—OBSTRUCTIONS. CHAPTER LIII, SECTION I."

"*Be it ordained by the Common Council of the City of Chicago*, "That no porch, galley, stoop, steps, cellar door, stair-railing, "or platform, erected or to be erected within the city, shall be "allowed to extend into or upon any sidewalk where the street "is less than seventy feet in width, more than four feet; nor "more than five feet, where the street is seventy feet and up-"wards in width. Any violation hereof shall subject the offender "to a penalty of twenty-five dollars, and to the like penalty for "every day such violation shall continue, after notice from the "Marshal or Street Commissioner of the proper division, to re-"move the same."

It also appeared in evidence, that the original ordinance, from which the foregoing provision is taken, was passed May 3, 1855, but, as then passed, did not allow of more than four feet encroachment upon the sidewalk in any case. On the seventh of February, 1856, the ordinance was amended by the City Council so to read as above.

John M. Van Osdel, being re-called by the defendant, testified: That it had always been understood by architects and builders, and also by the city authorities, that the foregoing ordinance applied as well to areas, like those around the building in question, as to the other objects therein particularly mentioned. That the ordinance had been amended upon his petition for the express purpose, as stated in the petition, of obtaining authority to construct five feet areas in the sidewalk where the street was seventy feet wide; such had always been the construction put upon the ordinance by the city authorities and others, and for that reason no special permit had ever (to his knowledge) been taken out in any case of the kind. The plan, as originally drawn for the defendant's building, called for only a four foot area, but after the change in the ordinance the area was extended to four feet ten inches, the streets there being seventy feet or more in width. My petition for an amendment of the ordinance was for permission to widen the areas between the sidewalk and buildings, and was signed by nearly all the architects in the city. I spoke to several members of the Common Council about it, and it was passed. Since the change in the grade, these areas have become very frequent.

The Court instructed the jury as follows:

There are not many facts in this case which are matters of controversy.

Mr. Robbins, the defendant, was the owner, in 1856 and 1857, of the lot on the south-east corner of Wells and South Water streets. In February, 1856, he made a contract with Peter Button for the construction of a building on his lot, which included as a part of it, a certain excavation of that portion of Wells street, usually appropriated to the sidewalk, and which was to be under the sidewalk, and covered with flag-stones, &c. When the building was completed, Mr. Button and other contractors, with their agents and servants, were engaged in completing the building and covering the excavation which had been made. While this was in progress, it seems that proper care was not taken to cover the hole which had thus been made in the street, and a young man by the name of Woodbury, in walking along the east side of Wells street, about 8 o'clock on the evening of the 28th of December, 1856, was precipitated into the area, which had been left unguarded. In January following Mr. Woodbury instituted a suit against the city in the Court of Common Pleas, of Cook County, and on the 24th of June, 1857, recovered a judgment against the city for the sum of fifteen thousand dollars and costs. The city having paid this judgment to the plaintiff in that suit for the damages which he sustained

by the accident, has brought an action against Mr. Robbins to be indemnified for the amount thus paid. And this is the controversy in the case. The question to be determined is, whether Mr. Robbins is liable under the law and the evidence.

The first thing to be ascertained is, whether Mr. Robbins had the right to cause the excavation to be made. That depends upon the fact whether he was authorized by the city. It is conceded in express authority or permission was given. The evidence on this point is, that no written permits were given to make these excavations. There was an ordinance which authorized certain things to be done, and the owners of lots assumed the right of excavating a portion of the sidewalk on the street and covering it with flag stones or otherwise for the use of foot passengers, and appropriated to their own use the area beneath. There was no special rule or regulation upon this subject, unless to be found in the ordinance referred to. It is certainly a matter of regret that a question so serious and affecting to so great a degree, the interests of the city and of owners of street lots should have been left in a condition thus vague and indefinite. It is apparent that many difficult and embarrassing questions may arise out of this appropriation to private uses of a portion of the public streets, and it were desirable that the rights of the public on the one hand, and of private persons on the other, should be regulated by specific ordinance. However, there seems no reason to doubt from the evidence, that the city authorities knew that excavations were made. It was the subject of contracts by the owners of property, and of estimates and specifications by architects, noticed and examined by the Superintendents of streets, and other city officers, well known and understood throughout the community. It was done without objection by the city or its officers. And the Court would lay down this rule upon this part of the case:

If the facts show that areas were constructed with the knowledge of the city authorities, and more particularly under an ordinance, even though somewhat vague in its meaning, that the Superintendents of streets gave directions in relation to them from time to time with the knowledge of the City Council, and that this particular area was excavated with the knowledge and acquiescence of the city authorities, they, in connection with the other facts proved, may raise a presumption or inference that there was a license or permission on the part of the city to the defendant to make the excavation, subject, of course, to the usual rules and regulations existing or prescribed in such cases.

If the defendant caused the excavation to be made without authority, express or implied, from the city; then it is admitted he did an unlawful act in constructing his area, and he would be

responsible for the consequences which would follow. But if he were only doing a lawful act, then a different rule may prevail. If he had a right to construct the vaults, then it may become ascertain the relation of the defendant to the work of the accident.

to have been formerly held in England, that when- ner of land made a contract for building, he was con- sponsible for any negligence of the servants of the however far they might be removed in relation to him and different contracts or service. Bush *vs.* Steinman, et & Puller. But the weight of modern authority is, nmediate relations of master and servant, or of princi- agent, must exist in order to render the owner ie rule now established is, that if the owner makes a r building or repairing a house, and the contractor ependent employment and service, and selects his own d servants without reference to the owner, the latter is nsible for the negligence of the servants of the con- less he was connected with such negligence personally act of commission or omission. There are one or two ded by the Supreme Court of Illinois, which seems to oad corporations liable for the acts of the workmen of ctors, but they may be said to rest on special circum- nd perhaps do not trench on the rule referred to.

then, was the position of the defendant as to this exca- He had let the work out by contract. The work was shed by the terms of the contract in September, 1856, s not, in fact, completed till February, 1857. It does ly appear how the time was extended, but the fact is ed and not denied, that the contractors and their work- ained on the work till the beginning of 1857. If, then, the contractors were in possession and control of the premises with their servants and agents, and were in their employment independent of the defendant at the time of the accident, and the defendant was not concerned personally in the negligence which caused it, it follows from what has been said, that he could not be held responsible for it. How the fact actually was in this respect, the Court leaves with the jury to decide under the evidence, as it leaves all the other facts in the case. It is proper to refer to a portion of the evidence which may have a very important bearing on the result. According to the testimony of Mr. Granger and Mr. Shipman, who were both in official positions in 1856, under the city, the condition of the sidewalk was the subject of conversation with the defendant before the accident occurred. Mr. Granger, the Superintendent of streets, spoke to the defendant, and to the foreman of the work of the dangerous state

of the covering over the area. The defendant admitted it, but stated that it was the business of the men to attend to it. The testimony of Mr. Shipman is, that late in the fall of 1856, Mr. Granger warned the defendant of the great danger there was to persons walking along the street there. His language was very strong—that somebody's neck would be broken if the covering was not attended to, and the defendant said he would see to it. During this conversation or conversations—and the jury will determine whether there was more than one—the defendant intimated that the men were careless about covering the area. Mr. Shipman also says, that at the request of Mr. Granger, he addressed the defendant a note through the post-office on the subject. I think, if these things are true, it seriously affects the question as to the liability of the defendant. It strikes me that under these circumstances, there is great reason in saying the owner shall take care of his own property and of his own contractors, and see to it that their negligence do not cause injury to the public.

It looks like a hard rule to compel the city, under this state of facts, to search out the immediate principal of the employees who have been guilty of the negligence, though he may be found in a dozen removes from the owner of the property, and though he may or may not be responsible, and to say that none but him and his employees shall be answerable for the consequences. It is conceded on all hands that the leaving the area unguarded in the way it was, was such an act of carelessness as to amount to a nuisance. If the fact be found by the jury, that the defendant had full knowledge of the state of the area, and of its exposed condition, and was warned by the agents of the city not to suffer it to remain in such a dangerous situation, and still, after such warning, it was suffered to continue, then, my opinion is, it was his duty, as the owner of the lot and the party who had caused the excavation to be made in connection with a part of his building, to see that it was properly and safely covered, and if he did not, that he should be held liable for the consequences of his neglect.

There is another point which should be considered, and that is, how far the city was itself in fault. If the accident was caused by the joint fault or neglect of the city and the defendant, or his employees, then the plaintiff cannot recover. But in looking at this point of the case, the jury will bear in mind the nature and character of the subject. The city has the care over the streets, and should not imperil in any way, by its own neglect, the life or limb of the citizen, but it is apparent that the owners of property must have the opportunity of constructing and repairing their buildings, and for that purpose must have the exclusive use of a portion of the street for a limited time. It may be neces-

responsible for the consequences which would follow. But if he were only doing a lawful act, then a different rule may prevail. If he had a right to construct the vaults, then it may become material to ascertain the relation of the defendant to the work at the time of the accident.

It seems to have been formerly held in England, that whenever the owner of land made a contract for building, he was considered responsible for any negligence of the servants of the contractor, however far they might be removed in relation to him by other and different contracts or service. Bush *vs.* Steinman, 3 Bosanquet & Puller. But the weight of modern authority is, that the immediate relations of master and servant, or of principal and agent, must exist in order to render the owner liable. The rule now established is, that if the owner makes a contract for building or repairing a house, and the contractor has an independent employment and service, and selects his own agents and servants without reference to the owner, the latter is not responsible for the negligence of the servants of the contractor, unless he was connected with such negligence personally by some act of commission or omission. There are one or two cases decided by the Supreme Court of Illinois, which seems to hold railroad corporations liable for the acts of the workmen of the contractors, but they may be said to rest on special circumstances, and perhaps do not trench on the rule referred to.

What ,then, was the position of the defendant as to this excavation? He had let the work out by contract. The work was to be finished by the terms of the contract in September, 1856, but it was not, in fact, completed till February, 1857. It does not clearly appear how the time was extended, but the fact is fully proved and not denied, that the contractors and their workmen remained on the work till the beginning of 1857. If, then, the contractors were in possession and control of the premises with their servants and agents, and were in their employment independent of the defendant at the time of the accident, and the defendant was not concerned personally in the negligence which caused it, it follows from what has been said, that he could not be held responsible for it. How the fact actually was in this respect, the Court leaves with the jury to decide under the evidence, as it leaves all the other facts in the case. It is proper to refer to a portion of the evidence which may have a very important bearing on the result. According to the testimony of Mr. Granger and Mr. Shipman, who were both in official positions in 1856, under the city, the condition of the sidewalk was the subject of conversation with the defendant before the accident occurred. Mr. Granger, the Superintendent of streets, spoke to the defendant, and to the foreman of the work of the dangerous state

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sary to take up and remove the sidewalk, to make excavations, and to do other acts upon the public streets. Now, it is almost impossible to lay down any absolute or fixed rule as to the degree of care which should be exercised by the city authorities in such a case as is before us. It is manifest while the excavation is going on, walls in process of construction, flag-stones and gratings being put down, that there are constant changes going on from day to day, and from hour to hour even. It could hardly be required or expected that the city would keep an officer on the spot at all hours of the day and night, to prevent the passenger from falling into any space which might be left open. There must be a reasonable view taken of the duty of the city in this particular, taking into consideration the work to be done and the means by which it is accomplished. It is for the jury to say whether, applying these rules to this part of the case, the fault or negligence of the city contribute in any considerable degree to produce the injury complained of. If it did, then the plaintiff cannot recover. The rule is, that one of two joint wrong-doers cannot have indemnity or contribution from the other. [And the Court, whilst leaving the fact as to whether there was fault or negligence on the part of the city to the jury, gave various illustrations upon this part of the case.] There is only one other question remaining, and that is, as to the effect of the verdict and judgment in the case of Woodbury v. the city in the Court of Common Pleas. If the defendant, under the law and evidence as stated by the Court, was liable for the damage sustained by Woodbury, and had full notice of the pendency of that suit, and had an opportunity of defending, then he is bound by that judgment. If the defendant shall be considered liable, the city is entitled to full indemnity, which is the amount of the judgment paid and costs, with interest from the time of payment; that is, from the 20th of July, 1857.

I have thus given you my views of the law of this case—the facts I leave to the jury. I have only referred to them by way of illustration.

To which charge and instructions of the Court the said plaintiff then and there filed the following objection:

1st. The said plaintiff objects and excepts to the instruction of the Court, wherein he charges that the jury, may, from the facts, raise the presumption or infer that *that* there was a license or permission on the part of the city to the defendant to make the excavation.

2d. The plaintiff further objected and excepted to the instruction of the Court touching the case of Bush *vs.* Steinman in the 3d of Bonsanquet & Puller, and to the further instruction of said Court, that the rule which governed was, that if the owner makes

a contract for building or repairing a house and the contractor has an independent employment and service, and selects his own agents and servants without reference to the owner, the latter is not responsible for the negligence of the servants of the contractor, unless he were connected with such negligence personally by some act of commission or omission.

The said plaintiff further excepts to the following language as used by said Judge in his said charge. "If, then, the contractors "were in possession and control of the premises, with their ser- "vants and agents, and were in their employment, independent "of the defendant at the time of the accident, and the defendant "was not concerned personally in the negligence which caused "it, it follows, from what has been said, that he could not be held "responsible for it."

The said plaintiff further excepts to so much of the said charge of the Court as leaves the question of joint negligence on the part of the plaintiff and defendant to the jury.

Exceptions as specially set forth allowed.

THOMAS DRUMMOND, [SEAL.]

Endorsed.

Filed April 8, 1860.

WM. H. BRADLEY,
Clerk.

And this day, to wit: the first day of June, in the year of our Lord one thousand eight hundred and sixty, the said plaintiff by its said attorneys, came into the Office of the Clerk of the Circuit Court of the United States for the Northern District of Illinois, and filed its Writ of Errors herein, which said Writ of Errors is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois. } *ss.*

The United States of America to the Judges of the Circuit Court of the United States for the Northern District of Illinois, *greeting:*

Because, in the record and proceedings, as also in the rendition of a judgment in a plea, which is in said Court before you, between the City of Chicago and against Allen Robbins, a manifest error hath happened to the great damage of the said the city of Chicago, as by its complainant appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf.

You are hereby commanded, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States should be done.

Witness the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, this first day of June, in the [SEAL.] year of our Lord one thousand eight hundred and sixty, and of our Independence the 84th year.

WM. H. BRADLEY,
Clerk.

Endorsed.
Filed June 1st, 1860.
WM. H. BRADLEY,
Clerk.

And this day, to wit: the fifth day of June, in the year of our Lord one thousand eight hundred and sixty, the aforesaid plaintiff by its said attorney, came into the office of the clerk of the Circuit Court of the United States for the Northern District of Illinois, and filed their bond herein, which said bond is in the words and figures following, to wit:

In error to the United States Circuit Court for the Northern District of Illinois.

THE CITY OF CHICAGO,
Plaintiff in error,
vs.
ALLEN ROBBINS,
Defendant in error.

Know all men by these presents, that the City of Chicago and Samuel D. Ward are held and firmly bound unto the above named Allen Robbins in the sum of one thousand dollars, to be paid to the said Allen Robbins, his executors or administrators, for the payment of which, well and truly to be made, we bind ourselves, our successors, heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated this 4th of June, 1860.

Provided, however, and this obligation is upon the express condition, that whereas, the above named City of Chicago has pre-

sented a writ of error to the Supreme Court of the United States, to reverse the judgment rendered by said Circuit Court in the above entitled cause in favor of said Allen Robbins.

Now, therefore, the condition of this obligation is such, that if the above named City of Chicago shall prosecute its said writ of error to effect, and shall pay all costs, if it shall fail to make good its plea, then this obligation to be void, otherwise the same shall be and remain in full force and virtue.

JOHN WENTWORTH,
Mayor.
SAMUEL D. WARD,
Comptroler.
SAMUEL D. WARD, [SEAL.]

Signed, sealed and delivered
in presence of
A. KOHN,
City Clerk.

Approved.
THOMAS DRUMMOND.

Endorsed.
Filed June 5th, 1860.
WM. H. BRADLEY,
Clerk.

Whereupon a citation issued out of the Clerk's Office of the Circuit Court of the United States for the Northern District of Illinois, and directed to the aforesaid defendant, which said citation is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois. } *ss.*

To Allen Robbins, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of the United States for the Seventh Circuit and Northern District of Illinois, wherein the City of Chicago is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, Thomas Drummond, Judge of the District Court, and ex-officio one of Judges of the Circuit Court of the United States, this 5th day of June, in the year of our Lord one thousand eight hundred and sixty.

THOMAS DRUMMOND.

Chicago, June 5th, 1860.

SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

THE CITY OF CHICAGO,
Plaintiff in Error.

vs.

ALLEN ROBBINS,
Defendant in Error.

ARGUMENT OF E. ANTHONY,
For Plaintiff.

CHICAGO:
PRINTED BY BEACH & BARNARD, 14 SOUTH CLARK ST.

1862.

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THE CITY OF CHICAGO,
PLAINTIFF IN ERROR.

VS.

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DEFENDANT IN ERROR.

ARGUMENT OF E. ANTHONY,

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CHICAGO:
PRINTED BY BEACH & BARNARD, 14 SOUTH CLARK ST.

1862.

STATEMENT OF CASE.

This was an action of trespass on the case, originally commenced in the Cook County Court of Common Pleas, in the city of Chicago, by the city of Chicago, against Allen Robbins, to recover of said Robbins the amount of a judgment of $15,000 and costs, which the city had been compelled to pay by reason of injuries done to one William H. Woodbury, who had fallen into an open area in the side walk, which area and excavation had been made *by the direction of Robbins*, for the purpose of making vaults, and of affording light to the basement of a large iron building, which Robbins was, at that time, constructing at the corner of Wells and South Water streets, in the city of Chicago, and which had been left open and unprotected by Mr. Robbins, or his agents.

Robbins was repeatedly *notified* and *warned* of the dangerous *condition* in which his workmen left the excavation, and he *promised* to see to it or have it seen to, but this he neglected to do, and on the night of the 28th of December, 1856, Mr. Woodbury, in passing along the street, fell into the open area and was very seriously injured. He sued the city and recovered a judgment for $15,000 and costs, which the city afterwards paid.

The *city notified* Mr. Robbins of the pendency of the suit brought against it by Woodbury, but he failed to defend it. The city defended the suit, but with the result above stated. After *this* suit had been commenced against Mr. Robbins, he filed his petition in the Cook County Court of Common Pleas, alleging that he was a citizen of the State of New York, and the court thereupon transferred the case to the United States Circuit Court. (See page 2 of Record.)

The declaration on pages 4, 5, 6, 7, 8, 9 and 10, contains a history of the case, as is here stated, and claims to recover of Robbins the amount of the judgment..... $15,000 00
Costs of court..... 22 35
Interest on the judgment up to the time it was paid ... 64 99
Sheriff's fees..... 108 70

$15,196 04

All of which had been paid by the city of Chicago *on account* of the *fault* and *neglect of Robbins.*

APPELLANT'S POINTS AND AUTHORITIES.

I.

The first position which the plaintiff assumes in this case is, that the city of Chicago is *primarily* bound to repair all defects in the highways, remove all obstructions and abate all nuisances thereon, which might prove injurious to the public or to indi[illegible] would *primarily* be liable to an injured party for all sulting from a neglect of that duty.

Browning vs. *City of Springfield*, 17 Ill.

From this it follows that the city is invested with the [illegible] control the streets, and has the right to *demand* of any person who causes any defects in the highways, that they be repaired; that obstructions be removed, and nuisances be abated; and in case of the neglect of the person upon whom such demand is made to comply therewith, the city may itself repair the defect, remove the obstruction, and abate the nuisance, and recover of the delinquent *all the expenses* which it incurred in consequence of such neglect or refusal.

II.

From this, it also follows that if *individuals* so use the streets and highways of a city that damage has resulted to a stranger, which the *city*, by virtue of its general duty to the public has been obliged to pay, they may and should be *liable over* to the city for all damages which they have caused.

MAINE—

State of Maine vs. *Inhabitants of Gorham*, 37 Maine, 451.
39 Maine, 253.

VERMONT—

Willard vs. *Town of Newberry*, 22 Vt. 458.
See, also, 25 Vt. 377 and
Batty vs. *Duxbury*, 24 Vt. 155.

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From this it follows that the city is invested with the power to control the streets, and has the right to *demand* of any person who causes any defects in the highways, that they be repaired; that obstructions be removed, and nuisances be abated; and in case of the neglect of the person upon whom such demand is made to comply therewith, the city may itself repair the defect, remove the obstruction, and abate the nuisance, and recover of the delinquent *all the expenses* which it incurred in consequence of such neglect or refusal.

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See, also, 25 Vt. 377 and
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The principle which these cases settle is, that the town or city is primarily liable to a traveler, but that the town has its remedy against all individuals who cause damage by reason of obstructing or interfering with the street in any way.

MASSACHUSETTS—

Lowell vs. *The Boston & Lowell R. R. Co.*, 23 Pick. 24.

"It *is not denied by the defendants, and cannot be*, that they are responsible ever to the plaintiff, by *operation* of law, if the plaintiff ere held answerable to Woodbury (Southwick) by reason of the le result of the deffendant."

City of Boston vs. *Worthington.*
Lowell vs. *Short*, 4 Cushing, 275.
Lowell vs. *Spaulding*, 4 Cushing, 277.

III.

THE JUDGMENT OF WOODBURY AGAINST THE CITY IS CONCLUSIVE ON ROBBINS.

Mr. Robbins having been notified of the pendency of the suit, and having failed to defend the suit, the amount of the judgment, with interest and costs, is conclusive upon him, and upon this point I quote, particularly, the case of *City of Boston* vs. *Worthington*, which is in manuscript, but which I believe is parallel in every respect with the case at bar. The case is as follows:

"METCALF, J. Southwick's judgment against the plaintiffs is "conclusive against the defendants as to all the facts thereby es "tablished, provided the defendants had due notice of the penden- "cy of the action in which that judgment was recovered and had "an opportunity to defend it. So far the adjudications are deci- "sive. In *Littleton* vs. *Richardson*, 3 Fogg, 187, BELL, J., thus "states the law: 'When a person is responsible over to another, "either by operation of law or by express contract, and he is duly "notified of the pendency of the suit, and requested to take upon

"him the defense of it, he is *no longer regarded as a stranger*, be-
"cause he has a right to appear and defend the action, and has the
"same means and advantages of controverting the claim as if he
"was the real and nominal party upon the record. In every such
"case, if due notice is given to such persons, the judgment, if ob-
"tained without fraud or collusion, will be conclusive against him,
"whether he has appeared or not.' In addition to the authorities
"there cited in support of his position, see *Clark* vs. *Carrington*, 7
"Cranch, 322: *Hamilton* vs. *Cutts*, 4 Mass 353; *Bond* vs. *Ward*,
"Natt & McCord, 201; *Kip* vs. *Bringham*, 6 Johns, 158.

"It is not denied by the defendants, and cannot be, that they are
"responsible over to the plaintiffs, by operation of law, if the
"plaintiffs were held answerable to Southwick by reason of the
"sole fault of the defendants. *Lowell* vs. *Boston & Lowell Rail-*
"*road*, 23 Pick. 24; *Lowell* vs. *Short*, 4 Cush. 275; *Lowell* vs.
"*Spaulding*, 4 Cush. 277.

"Had the defendants such notice of the pendency of Southwick's
"action as renders the judgment, recovered therein, conclusive
"against them to any extent? We are of opinion that they had.
"They were informed, when Southwick's writ was returnable, that
"he had sued for an injury received, on a day named, by a defect
"in the highway called Congress Square, in a place occupied by
"them; they were directed to take notice that the plaintiffs would
"hold them responsible, who had the charge and custody of the
"place of the accident, and they were required to govern them-
"selves accordingly. They were not, in terms, requested to take
"upon themselves the defence of that action. And this was not
"necessary in order to render the judgment conclusive against
"them as to the facts thereby established. There are numerous
"cases in which parties have been held bound by judgments re-
"covered in actions of which they had notice, though they were
"not expressly requested to defend those actions. *Blasdale* vs.
"*Babcock*, 1 Johns. 517; *Barney* vs. *Dewey*, 13 Johns. 226; *War-*
"*ner* vs. *McGary*, 4 Verm. 500; *Beers* vs. *Pinney*, 12 Wend. 309.
"The defendants, by the notice given to them of Southwick's ac-
"tion had an opportunity to defend it, and the case shows that they

"'were present at the trial, and testified therein.' This fact, ac-
"cording to SPENCER, J., in 13 Johns. *ubi. sup.*, is sufficient to show
"such notice as to render the judgment conclusive against them.

"The defect in the highway, for which the plaintiffs were made
"answerable to Southwick, was an uncovered cellar-way, not pro-
"tected by such a railing as was required by the ordinances of the
"city; and this defect existed before the defendant's occupied the
"place of the accident. And they contended that they had no
"legal right to remedy that defect, and therefore are not responsi-
"ble for it, because their lease provided that no alterations nor
"additions should be made by them without the written consent of
"their lessors. But we have no doubt that the repairing of a de-
"fect is not an alteration or an addition, within the meaning of the
"lease. Nor do we suppose that a covenant by the defendants,
"with their lessors, to continue a nuisance, would exonerate them
"from liability to third persons, or to the Commonwealth, for its
"continuance.

"The judgment recovered by Southwick against the plaintiffs is
"conclusive against these defendants on these points:

"That the highway in Congress Square was defective; that
"Southwick was injured there while using due care; and that he
"suffered damage to the amount of twelve thousand dollars. But
"it is not conclusive against the defendants on the question, whether
"they were bound to keep the highway safe—or, if they were,
"that they were guilty of such negligence as would charge them
"in this suit, or would have charged them, if Southwick had brought
"an action against them, nor on the question whether Southwick's
"damage was caused by their sole fault."

See, also, 2d volume of Cowen & Hill's Notes to Phillips' Evidence, page 5.

Leather vs. *Poultney*, 4 Binn. 352—356.
Hamilton vs. *Cutts*, 4 Mass. Rep. 349—353.
Bender vs. *Fromberger*, 4 Dall. Rep. 436.
Witmer vs. *Schlatter*, 2 Lawle's Rep. 204.

Bond vs. *Ward*, 1 Nott & McCord, 201.
Jacob vs. *Pierce*, 2 Rawle, 204.
Waldo vs. *Long*, 7 John. 173.
Blasdale vs. *Babcock*, 1 John. 517.
Barney vs. *Dewey*, 13 John. 226.
Kip vs. *Bingham*, 6 John. 158.
Pinney vs. *Gleam*, 5 Wend. 535.
Tarlton vs. *Tarlton*, 4 Maule & Sel. 20.
Henderson vs. *Leney*, 2 Greenl. 139.
Porter vs. *Cole*, 4 Greenl. 29.

IV.

The excavation was a nuisance, per se.

The excavation, which caused the injury, was made in the side-walk of a public street in the city of Chicago—was about one hundred feet in length, four feet in width, and eight feet deep—and was a part of a *plan* of Robbins, deliberately formed, by which he sought to derive benefit and advantage to himself, by encroaching upon and occupying a portion of the street, which plan was prepared by the architect of Robbins, and *adopted* by him; and the excavation made and building erected by him, and under the direct supervision of his agent, John M. Van Osdell. The evidence of Van Osdell on that point, (see page 19 of Record,) is as follows:—
"I am an architect. I know the building at the corner of Wells
"and South Water streets. I *superintended* its erection *for Mr.*
"*Robbins.* I prepared the plans, have the plan of the basement
"story here. [Exhibits the plan.] These plans were adopted by
"Robbins. It *called for the excavation in the side walk* and the
"area. In addition to furnishing plans, I *superintended* the erec-
"tion of the building. The building was erected for Robbins;
"gave him the *certificate for payment.* Saw Robbins at the build-
"ing occasionally, during the whole summer. He *was aware* that
"excavations were to be made in the side-walk, and was there
"while the excavations were going on."

Robbins *never had any authority* whatever from the city authorities, to make the excavation, and after the excavations were made, it was left open, *unguarded and unprotected* by Robbins, who was repeatedly notified of its dangerous condition, but who neglected or refused to protect the same, in consequence of which, the accident happened, and the injury occurred.

It is respectfully submitted to this court,

FIRST,—That to dig such a hole in the streets of a city, *without authority*, was unlawful; and to leave it open, unguarded and unprotected, was a most reckless and careless act, and constituted the excavation a *nuisance*, for which Robbins should be held liable for all damages arising from the digging of the same.

Any act of an individual, done to a highway, though performed on his own soil, if it detract from the safety of travelers, is a nuisance.

Dygert vs. *Schenck*, 23 Wend., 447.
Hart vs. *Mayor of N. Y.*, 9 Wend., 607.
Cokes vs. *Birge*, 9 Georgia, 425.
Viner's Abr., title Nuisance; and Blackstone's Commentaries, Bacon's Abridgement, title Nuisance.

A ditch dug in the public highways is a nuisance.

Dygert vs. *Schenck*, 23 Wend. 447.
Harlow vs. *Humiston*, 6 Cowen, 191.
Lansing vs. *Smith*, 8 Cowen, 152.

"There is no doubt but that *all injuries whatsoever*, to a high-
"way, as by digging a ditch, or making a hedge across it, or lay-
"ing logs of timber in it, or doing any other act which will ren-
"der it less commodious to the King's subjects, are public nuisan-
"ces at common law."

1 Russell on Crimes, 347.
1 Hawk, P. C. ch. 76, sec. 144.

An obstruction, endangering the public travel, would be a *nuisance*, tor which the party placing it there would be liable in damages, in case any injury should be caused by it.

Hamden vs. *New Haven and North County*, 27 Conn., 167.
City of Providence vs. *Clapp*, 17 How, 169.
15 Maryland, 16.
9 Maryland, 173–4.

By the common law, *every encroachment* or incumbrance upon a highway, by which it is rendered less commodious to the people, is a public nuisance, and may be removed by any individual.

Burnham vs. *Hotchkiss*, 14 Conn. 311.
1 Hawk. P. C., 212, 214.
2 Burn's Just., 170, 484.

"A nuisance," says Blackstone, "is anything which worketh hurt "to the citizens at large."

3 Blackstone's Com. 216.
Fowler vs. *Sanders*, Cro. Jac., 446.
6 East., 427.
3 Campb., 224, 227.

SECOND.—"Every owner of real estate is bound to prevent nui- "sances on his own premises, which are created in the course of "doing work there for him by anybody or on any terms; for he has "no more right to allow others to erect nuisances on his premises, "than to do it himself."

Wiswall vs. *Brinson*, 10 Iredll, 565.
Bush vs. *Stienman*, 1 Bos. & Pull.
Laugher vs. *Poinuer*, 5 Barn. Cres., 547.
(especially and particularly the opinion of LITTLEDALL.)
Quarmane vs. *Bennett*, 6 M. & W. 710.
(see opinion of PARKE B.)
Rapson vs. *Corbett*, 9 M. & W. 710.
Burgess vs. *Gray*, 1 Com. B. 578.

Sadler vs. *Henlock*, 30 Eng. Law & Eq. 167.
Samyn vs. *McCosky*, 2 Ohio N. S. 536.
Stone vs. *Cadman*, 15 Pick. 297.
Nota Bene. *Linsley* vs. *Bushnell*, 15 Conn. 237.
Gardner vs. *Heartt*, 2 Barb. 155.

V.

After the excavation was dug, it was left open, unguarded and unprotected, and Robbins knew it. This made it a continuing nuisance.

1. Where a nuisance is erected or continued by the property of an individual, whether that property be animate or inanimate, real or personal, and during the continuance of that nuisance, he claims or exercises acts of ownership over it, he is liable for any injury occasioned by such nuisance, especially when he *neglects to remove it after reasonable notice.*

A man must take such care of property owned by him, and subject to his control, that another will not be exposed to injury by it. "*Sic ubere tuo ut alienum non loedos.*"

Nor is it necessary, to make the defendant liable, that he should have done any positive act; if he leave *undone* that which he *ought* to do, and an injury ensues, he must answer for it.

Linsley vs. *Bushnell*, 15 Conn., 237, 289.
This case is very important and directly in point.
Lesley vs. *Pounds*, 4 Saunton, 649.
Bull., N. P. 25, 75.
Dicon vs. *Bell*, 1 Stork Ca., 287.
1 Stark Ca., 189.
1 Bing. 213.
1 Chitty, 95.

CONNECTICUT—
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The Jurist Vol 6, p 602

2. The testimony of Van Osdell, Elihu Granger, the Superintendent of Public Works, and Elias Shipman, his chief clerk, on pages 21. 22, and 23, of Record, SHOWS that the AREA HAD BEEN DUG, and EXCAVATION MADE LONG BEFORE the accident, and that Robbins KNEW of the dangerous condition of the hole, and that he was WARNED and NOTIFIED both VERBALLY and in WRITING, that he must keep the area covered, or he would be held liable; that he promised to see to it, but that he neglected or refused to keep it covered, and that in consequence thereof, the accident happened.

Mr. VanOsdell, in his testimony, says that the plans were slightly modified, and the grade of the side-walk raised. "Mr. Robbins di-"rected me as to raising the *side-walk* to the grade."—Page 20 of Record.

Elihu Granger testifies, page 21 of Record, that he was City Superintendent in the year 1856; "passed the building two or three "times a day; knows Robbins, saw him occasionally, not very oft-"en, about there, while the building was being erected. The flag-"ging was laid down as early as September, perhaps, or it may "have been as late as November. There was an area four to five "feet wide next the building, after the side-walk was laid. I had "conversations with Robbins about every time I met him there. I "had one with him after the flagging was laid down, about the "*area*, as to how it could be covered. I think I said that it ought "to be covered up with sticks across and plank on the sticks, and "I think it was done to some extent, and perhaps wholly after that. "I think while they were at work there, they opened it when they "were putting on the iron grating. I considered it my duty, as "city Superintendent, to warn him of any accident that could hap-"pen. When I directed R's. attention to the condition of the area, "I said I thought it ought to be covered up, and suggested the "mode in which it should be done. I think I said to R. that it "was sleety, and people were passing rapidly, they might slip in; "that somebody's neck would be broken, if the covering were not "attended to; and he said *he would* attend to it. Mr. Robbins "said the matter was all in the hands of his contractor; that it be-

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Mr. Shipman says: "Resided here in 1859—head clerk in Gran-
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"four times and usually six times a day. The flagging on Wells
"street was commenced at east end, some time in September, may
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"on both fronts; the area was usually entirely open until after the
"grating was all done. Some time after the flagging was done,
"and before the concrete floor of the area was laid, I was present
"at a conversation with Granger and R. exactly at corner of build-
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"myself picking up plank, and putting it across end at corner—
"have pretty distinct recollection of doing it more than once;
"*found them afterwards removed.* There used to be gang planks
"running from side-walk to building; I don't remember ever see-
"ing the area covered till it was covered by grating."

Burgess vs. *Gray*, 50 Eng. C. L. 579, decided 1845, is directly in point. That case was this: B, the *owner* and occupier of premises *adjoining the highway*, employed C. to make a drain therefrom, to communicate with the common sewer. In the performance of this work, the workmen employed by C. placed gravel on the highway, in consequence of which, A., in driving along the road, sustained a personal injury. *Before* the accident, the *dangerous position* of the heap was *pointed out* to B. who *promised* to remove it. C. had the sole management of the work, and employed and paid D. to cart away part of the rubbish, at a certain price per load, and had charged B. in his bill with the sum so paid. *Held*, that *B. was liable* to A. in case. The only evidence tending to show that the de-

fendant had personally interfered in the mater, was that of a policeman, who stated that upon observing the heaps left on the road side opposite the defendant's premises, he called the defendant's attention to it, and told him it must be taken away. Whereupon the defendant said he would remove it as soon as he could. This was taken by all of the Court to be an admission that he was exercising dominion over it. (See page 500.)

The argument of Sergt. TALFOURD is a concise and masterly statement of the law upon the subject, which was followed by the court, in their decision of the case; and his review of the English cases, points out clearly the *distinction* which is contended for in *this case.*

See also, *Randleson* vs. *Murray*, 35 Eng. C. L. 343, decided 1838, (8 Ad. & Ellis, 109.) This was a case where a warehouseman at Liverpool employed a master porter to remove a barrel from his warehouse. The master porter employed his own men and tackle; and through the negligence of the men, the tackle failed, and the barrel fell and injured plaintiff. Held, that the warehouseman was liable in case for the injury.

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See especially and particularly the opinion of Judge COMSTOCK in the *Mayor of Albany* vs. *Creniff*, 2 Comstock, page 180. Also
Congreve vs. *Smith*, 18 N. Y., 83.
Congreve vs. *Morgan*, 18 N. Y. 85.

The case of *Boswell* vs. *Laird & Chambers*, 8 California, 493, is also referred to as being in point for the defendant; but the court in that case, after quoting various cases in regard to the subject of contractors, say:

"If the injury complained of arose not from the manner in "which the embankment or dam was constructed, but from the "fact that it was constructed at all, that is, if it was a structure "amounting to a nuisance, liability therefor would attach equally "to Laird and Chambers, and the contractors, Moore and Foss.

"The authorities limit the liability to cases where structures "amounting to nuisance, are erected on or near, and in respect to "fixed property of the owner, and place the liability on the ground "that every man is bound to use and manage his own property so "as not to injure others; when the structure is erected by *permission* of the owner, there is reason in limiting the liability to "cases where the nuisance is placed on or near and in respect to "his own property; but when it is erected by his express *direction*, "we can perceive no reason for the limitation. It is not the structure itself, but its character as a nuisance, that causes the injury and creates the liability.

"If the mode and manner which constituted the defect by which the injuries complained of were occasioned, had been inherent in the plan, and this plan had been devised by Laird and Chambers, which the contractors were simply engaged to carry out, then liability would attach to Laird and Chambers, for injuries occurring in its progress as well as afterwards."

Mayor on Liability p 77.

VII.

The court instructs the jury to legalize a nuisance which has been created without authority; and in so doing, misled the ury.

The defendant further contended, on the trial of the case, and the court so instructed the jury, that, "if the particular area was excavated with the knowledge and acquiescence of the city authorities, they, in connection with other facts proved, may raise a *presumption* or inference that there was a license or permission on "The part of the city to the defendant, to make the excavation, "subject, of course to the usual rules and regulations existing or "prescribed in such cases."

Now, there is no pretence whatever, that Robbins or any of his servants, agents or contractors, ever had any *special* authority to make the excavation or dig the hole. All the evidence shows that Robbins went, without any leave or license from anybody, and dug up the side-walk, and made the excavation in question, and after he had so dug it up, that he was constantly and repeatedly warned of its dangerous condition and told to cover it up. Was it necessary for the city to have indicted him for the nuiance, or prosecuted him for a violation of the city ordinances, in order to show that Robbins had done an illegal act? Can Robbins plead that because he went unwhipt of justice, that the nuisance that he created, was right and proper? Can Robbins, when called to account, shield himself from responsibility, by taking advantage of *his own wrong*?

Can he say, that if the excavation was unlawful that the city should have prosecuted him or protected it themselves? Did not the city warn him, and did he not *promise* to protect the excavation, and if he *misled* the city superintendent can *he set that up* also? Is he not *estopped* by his own acts?

Can such an instruction of the court, as above stated, be proper,

which seeks to transform a most flagrant and illegal act into a right and proper one, by interposing a *presumption* and telling the jury they can infer *legality* in the absence of open arraignments or positive prosecutions? There certainly was no evidence on which to base it, and it cannot be understood on any other hypothesis.

The cases of *Congreve* vs. *Morgan*, 18 N. Y. 84, and *Congreve* vs. *Smith*, 18 N. Y. 79, are again in point, and are the strongest kind of authority against the instruction of the court.

In *Hart* vs. *City of Buffalo*, 36 Barb. 226, it was decided that the public authorities are not to be presumed to have notice of a latent defect in the covering of an opening in a side-walk which was not made by them or under their direction. Notice to the public authorities of defects or obstructions in the streets, not occasioned by their own acts, must be express, or the defects must be so notorious as to be evident to all who have any occasion to pass the place or observe the premises.

Hart vs. *City of Brooklyn*, 36 Barb. 226.
See, also, *Nelson* vs. *Godfrey*, 12 Ill. 20.

VIII.

The defendant contends that if the *nuisance* was created by *contract*, that Robbins is not liable. To this we reply: 1st, There was *no* contract to interpose, *at the time of the accident*, which affected the excavation. 2d, *If the nuisance* had been *created by contract* it was *no* defense whatever.

But the defendant in this case further insists, that Robbins had made a *contract* for doing the work with a skillful and competent contractor, and he insists that if any accident did occur, while the work was being performed, that the contractor or his servants should be liable, and not Robbins.

Now if this position is correct, it becomes important at once to

see if, *at the time of the accident*, there was a contract existing between any parties who had possession of the building.

1. The evidence upon this point, which was introduced by the defendant on the trial, consisted of a contract between Robbins and one Peter Button, dated Feb. 20, 1856, which provided that Button was to do all of the brick and stone work, and have it all completed on the *first day of September*, 1856; and that "*time was the essence of the contract.*" (See pages 24 and 25 of Record.)

The contract of Button expired, by its terms, on the 1st day of September, 1856—Woodbury was injured December 28th, 1856.

John H. Sendlebeck, the foreman of Button, (page 25 of record) swears—"We dug the area *early in the Spring* and then covered "it all up in with joists. The iron men then came on from New "York and did their work. *We* had the whole space covered snug "up to the building. The iron men had their derrick standing on "these joists. After they put part of the iron work up, Cook came "on and laid the flagging; he took up part of the joists, as he wanted "to lay the flagging."

Now, when was this? It does not appear at all; neither does it appear that *any contractor* had any control over the area or the premises; the evidence utterly fails to disclose any such fact.

This fact cannot, therefore, fail to have an important bearing upon the whole case, and *cannot* be overlooked when cases are cited, relating to the subject which are wholly and entirely destitute of *this feature.*

It nowhere appears that this contract was ever extended at all, and no other is shown; but it does appear that the *area or excavation had been dug long before the accident*, and *was, on the 28th of December*, 1856, left *open* and *unguarded;* in *consequence* of *which* Woodbury fell in and was injured.

If any body else, besides Robbins, was in possession of the building, and had control of *that excavation* on the 28th of December,

1856, the defendant utterly failed to show it, and in the absence of such proof, I contend that Robbins must be *presumed* to have *possession of his own premises*, and responsible for the same.

2. And here it was, that the Judge, on the trial of the case in the court below, committed *the great error.* He utterly failed to mark the distinction which runs through all of the cases in regard to nuisances, or works amounting to nuisances, or where the owner *knew* of the dangerous character of the work contracted for, and failed to protect it, and instructed the jury broadly, that "*if the owner makes a contract for building or repairing a house, and the contractor has an independent employment and service, and selects his own agents and servants, without reference to the owner, the latter is not responsible for the negligence of the servants of the contractor*," &c. This, the jury took as a positive instruction, that if the evidence showed that there were any contractors around who had anything to do with the work, and the owner was not there *personally*, aiding or abetting by act or deed, and an accident occurred, that the owner would not be liable. This was the view which the court took of the subject, and so charged the jury, and this view is *again broadly presented to this court by the defendant*, who at the very threshold of his defence, asks this question: "Is the owner of a lot of land, who employs a skillful and competent contractor (exercising an independent employment) to erect a building on such owner's lot, liable to third persons for injuries happening to them, by reason of the negligence of such contractor, in the prosecution of the work?

As a *general* and *abstract* question, an answer to this would probably be very interesting.

But I beg the court to observe, that this case is not based upon any carelessness or negligence in the *actual execution* or *performance of the work*, for the ditch might have been carefully and skillfully dug, and the contractor and workmen might have been the most expert that could have been found in the world, but the real cause of complaint arises from the fact that the hole, when dug,

was left *open*, *unguarded*, and *unprotected*, and in a *dangerous condition*, in *consequence* of which the accident occurred.

Therefore, the real question which *this* case presents is this: Is the owner of a lot of land, who undertakes to build a building, and who, *for his own sole use and benefit*, goes into a public street in a great city and digs a deep and dangerous hole, and when said hole is dug, leaves the *same open*, *unguarded and unprotected*, so that a *stranger*, in walking along, falls into the same and gets injured, is responsible for his careless, reckless and negligent act or not?

And, upon this point, I submit that the current of English and American authorities is almost unbroken; and while there may be found many cases which hold—that the *contractor* is liable for the immediate acts of his servants and workmen, while actually employed in the execution of a particular work, yet there are but few, if any, cases which excuse the owner of real estate from liability where he creates causes or continues anything amounting to a nuisance, simply because he had made a *contract* with independent contractors for the same.

The cases upon this point are numerous, and I will only call attention to a few of the most recent and leading cases upon this subject:

NEW YORK—

Nota Bene. *Storrs* vs. *City of Utica*, 17 N. Y. 108.
" " *Congreve* vs. *Smith*, 18 N. Y. 82.
" " *Congreve* vs. *Morgan*, 18 N. Y. 85.
Bailey vs. *Mayor of New York*, 3 Hill, 543.
Dygert vs. *Schenck*, 23 Wend. 447.
Mayor of New York vs. *Bailey*, 2 Denio, 444.

The opinion of the court in the case of Storrs, 17 N. Y., and the two cases in the 18 N. Y., we regard as perfectly conclusive.

Hart vs. *Mayor of New York*, 9 Wend. 607.
Harlon vs. *Humiston*, 6 Cowen, 191.
Lansing vs. *Smith*, 8 Cowen, 152.
City of Buffalo vs. *Halloway*, 3 Selden, 493.

214 Block 349

Judge COMSTOCK, in *Storrs* vs. *City of Utica*, 17 New York, 106–7, points out the true doctrine which is contended for, and shows that the injuries which constituted the cause of action in the cases of *Blake* vs. *Ferris*, 1 Selden, 48, in *Pack* vs. *Mayor of New York*, 4 Selden, 227, and *Kelly* vs. *Mayor of New York*, 1 Kernan, 435, arose by *acts* of workmen while *in the actual performance* of the work, while in the case at bar they did not.

In the case of *Vanderpall* vs. *Husson*, 28 Barbour, 198, Justice HOGEBOOM says:

"The general rule is, that where the work is done under a con-
"tract, and the injury occurs from the act or negligence of the ser-
"vants of the contractor, and not those of the owner, the owner is
"not responsible," quoting cases.

"But there are EXCEPTIONS to the general rule where *the work* or
"execution is itself a nuisance, or where the injury was itself a
"necessary result of the contract, and in some cases not material
"to be noticed."

Stevens vs. *Armstrong*, 2 Selden, 436.
City of Buffalo vs. *Holloway*, 3 Selden, 493.
Congreve vs. *Morgan*, 5 Duer. 495.

ILLINOIS—

Nelson vs. *Godfrey*, 12 Ill. 20.
Lesher vs. *The Wabash Nav. Co.* 14 Ill. 85.
Johnson vs. *Barber*, 5 Gil. 430.
Hinde vs. *The Wabash Nav. Co.* 15 Ill. 85.
Chicago, St. Paul & Fond Du Lac R. R. Co. 20 Ill. 386.

The case of *Scammom* vs. *City of Chicago*, 25 Ill. 438, which is cited by defendant and relied on, is not of as much weight as the former cases; because, as will be shown by the slightest examination of those cases—that it misstates both the grounds of the decision and the facts in several very important particulars—and as a comment upon that decision, see opinion of Judge COMSTOCK, in *Storrs* vs. *City of Utica*, 17 N. Y., p. 108.

PENNSYLVANIA—

Shaw vs. *Reed*, 9 Watts & Serg. 72.

NORTH CAROLINA—

Wiswall vs. *Brunson*, 10 Iredell, 555, and especially the opinion of Ruffin, who, although he delivered a dissenting opinion, most ably and fully sustains the doctrine contended for by the plaintiff in error in *this* case.

VERMONT—

Brown vs. *Lent*, 20 Vt. 529.
Hill vs. *Morley*, 26 Vt. 178.

MASSACHUSETTS—

Lowell vs. *Boston & Lowell R. R. Co.*, 23 Pick. 35.
Thayer vs. *City of Boston*, 19 Pick. 516.
Stone vs. *Cadman*, 15 Pick. 297.
Earle vs. *Hall*, 2 Met. 353.
Gray vs. *Portland Bank*, 3 Mass. 385.

U. S. COURT—

Phil & Reading R. R. Co. vs. *Derby*, 14 Howard, 486—decided by Justice GRIER.

The case of *Clark* vs. *Fry*, 8 Ohio, 359, is referred to, among others, by the defendant, as an authority in his favor; but if that case is examined closely, it will be found that the court distinctly recognize the doctrine, that where anything is to be done under a contract, which is itself unlawful or *necessarily injurious* to a third person, the *employer*, as well as the employee, would be liable for any injury resulting therefrom.

The case of *Morgan* vs. *Bowman*, 22 Missouri, 529, and

The case of *Barry* vs. *City of St. Louis*, 17 Missouri, 122, are directly in conflict with the case of *Inhabitants of Lowell* vs. *Boston & Lowell R. R. Co.*, 23 Pickering, 24; and I ask particular attention to this case, and also to *Earle* vs. *Hall*, 2 Met. 353.

See, also, *Burgess* vs. *Gray*, 50 Eng. C. L. 579, 1 M. G. & S. 578.

In the case of *Laugher* vs. *Pointer*, 5 Barn. & Cress. 560, Justice LITTLEDALE lays down this rule: "In all cases, where a man is in possession of fixed property, he must take care that the property is so used and managed that other persons are not injured, *and that whether his property be managed by his own immediate servants or by contractors*, or their servants. The injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable, when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined, by law, to himself, and he should take care not to bring persons there who do mischief to others.

If any person *contract* with another to perform work, and in the course of doing it, a *nuisance is created*, the *employer*, the *person who caused* the *work to be done*, is liable, and not *merely* the hand that did it.

King vs. *Dewnop*, 16 East. 194.

The case of *Ellis* vs. *The Sheffield Gas Consumers*, 75 Eng C. L. 169; decided 1853; is another case particularly applicable to the case at bar; and Lord CAMPBELL, in his opinion, explodes the whole doctrine that is contended for by the defendant in this case. That case was this: The Gas Company made a *contract* with Watson Brothers, to dig trenches in the streets of Sheffield, to lay down gas pipes; and in doing so, the servants of Watson Brothers left a heap of stones and earth upon the footway, and the plaintiff, in passing along the street, fell over them and broke her arm.

Lord CAMPBELL said, that, "they employed Watson Brothers to "break up the streets, and in so doing, to heap up earth and stones, "so as to be a public nuisance, and it was in consequence of this "being done by their order, that the plaintiff sustained damages. "It would be *monstrous* if the party *causing* another to do a thing, "were exempted from liability, merely *because* there was a *contract* "between him and the person immediately causing the act to be "done."

WIGHTMAN, J., said: "But for the direction to break up the

"streets, the accident could not have happened; and though it "*may be* that if the workmen employed, had been careful in the "way in which they heaped up the earth and stones, the plaintiff "would have avoided them; still, I think the nuisance, which the "defendants *employed the contractors* to commit, was the *primary* "*cause* of the accident."

And I say in regard to all the cases cited by the defendant in error, as Justice EARLE said, in his opinion, that "the *cause* of the *ac*- "*cident* was the *very thing* done in pursuance of the specific direc- "tions of the defendants contained in the contract, and that, in my "opinion, makes the distinction between the *present case* and those "*cited*, in which the cause of the accident was the negligence of "those doing the thing, *not* in the *thing itself*."

In *Newton* vs. *Ellis*, 85 Eng. C. L. 115, decided 1855; which was was an action brought against the defendant, who had contracted with a local board of health, to dig wells for them, according to a specification proposed by the surveyor, as follows: "The whole "work to be done to the satistaction of the Holreace Local Board "of Health, or their surveyor or whom he may appoint; and the "digging out thereof is to be done entirely under the direction of "the surveyor; and the whole of the works to be completed by "the 11th day of October next." And the defendant had commenced digging the well in the highway, and left it at night unguarded and unprotected; in consequence of which an injury took place to a traveler. It was held that a contractor, under *such circumstances*, and under such a contract, represented the company, and would be held to have done their work under *their direction*. See opinions of the court on page 123, and especially that of EARLE, J. on page 124.

Quarman vs. *Burnett*, 5 M. & W., 499. See particularly the opinion of PARKE, B., in which he recognizes the doctrine that, if the owner of fixed property causes acts to be done which amount to *nuisances* he would be liable, whether he managed it by his own immediate servants, or by contractors or their own servants.

Hayes Liability p 243.
4 Ellis Black 575
45 Eng. C. L. 298
Nola Bow v. Manny Scott 420.

Redie vs. *London & Northwest Railway Co.*, 4 Exchequer, 943, was a case where the accident happened by the carelessness of a workman, in letting fall a stone upon a passer by, while employed upon the work, and is *most clearly distinguishable* from the case at bar.

In *Laugher* vs. *Pointer*, 5 B. & C., 547, LITTLEDALE recognized the liability of the owner of real estate for injuries done, in consequence of the creation of *nuisances*, or the performance of acts thereon which produce injury to third persons.

In the case of *Redie* vs. *London & Northwestern Railway Company*, ROLFE, B., in delivering the opinion of the court, said, "on "full consideration we have come to the conclusion that there is no "such distinction, unless perhaps, where the act complained of is "such as *amount* to a *nuisance*." And in the argument of the case of *Knight* vs. *Fox*, 5 Ex. 723, PARKE B. said, "That means a nui- "sance as connected with a man's house or with his fixed prop- "erty."

The real distinction, in all this class of cases, is finely stated by WILDE B., in the case of *Hole* vs. *Sittingbousne & Thames R. R. Co.*, found in vol. 9, No. 13, of the Weekly Reporter, published in London. The case was similar to the one at bar, and on deciding it he said:

"The real distinction in these cases is this: When the injury "is occasioned by the negligent act of a servant of the contractor, "collateral to the execution of the work, which the contractor is "engaged to perform, then the contractor, his master, is liable; but "but if the injury, by the doing that which the contractor was em- "ployed to do, the person who employed him is responsible; in "other words, where the mischief arises from the improper or de- "fective doing of that which is ordered, the person ordering the "doing of it is answerable. Here the defendants employed the "contractor to build a bridge, and it was so made as to be an ob- "struction to the navigation. Although it may be that what the "contractor did was an insufficient carrying out of the delegated "authority, still it was done under and pursuant to that authority,

"and the consequences are the same as if the defendants had themselves done the act. It is the same in principle as the case of a "person requiring another to set up a structure, which is regarded "by the law as a nuisance; *then the person ordering it to be done "would be responsible.* It is no answer for the defendants to say, "'we *did not order it to be so done as to constitute it a nuisance*'; it "is sufficient that they *ordered the doing of the act*, and that it "*was a nuisance.*"

CONCLUSION.

The instructions which the court gave to the jury, and which were particularly excepted to, are as follows: On page 30 of the record—

"It seems to have been formerly held in England, that whenever "the owner of land made a contract for building, he was considered "responsible for any negligence of the servants of the contractor, "however far they might be removed in relation to him by other "and different contracts or service. *Bush* vs. *Steinman*, 3 Bosanquet & Puller. But the weight of modern authority is, that the "immediate relations of master and servant, or of principal and "agent, must exist in order to render the owner liable.

"*The rule now established is, that if the owner makes a contract "for building or repairing a house, and the contractor has an independent employment and service, and selects his own agents and "servants, without reference to the owner, the latter is not responsible for the negligence of the servants of the contractor, unless he "was connected with such negligence personally by some act of commission or omission.* There are one or two cases decided by the "Supreme Court of Illinois, which seems to hold railroad corporations liable for the acts of the workmen of the contractors, but "they may be said to rest on special circumstances, and perhaps "do not touch on the rule referred to."

"*If, then, the contractors were in possession and control of the*

"*premises, with their servants and agents, and were, in their em-*
"*ployment, independent of the defendant at the time of the acci-*
"*dent, and the defendant was not concerned personally in the negli-*
"*gence which caused it, it follows, from what has been said, that*
"*he could not be held responsible for it.*"

"If the facts show that areas were constructed with the knowl-
"edge of the city authorities, and more particularly under an ordi-
"nance, even though somewhat vague in its meaning, that the
"superintendent of streets gave directions in relation to them from
"time to time, with the knowledge of the city council, and *that*
"*this particular area was excavated with the knowledge and acqui-*
"*escence of the city authorities*, they, in connection with the other
"facts proved, *may raise a presumption or inference* that there *was*
"*a license* or *permission on the part of the city to defendant to make*
"*the excavation, subject of course, to the usual rules and regulations*
"*existing or prescribed in such cases.*"

And now, tested by the law and by the authorities which have been cited in this case, is it not perfectly apparent that the court was entirely misled by a consideration of the relation of contractors and sub-contractors, who, in the *execution* and *performance* of a work are guilty of negligence, when *that relation* had really nothing whatever to do with *this* case.

Is it not perfectly apparent that when the court instructed the jury that contractors and their servants were alone liable for leaving the excavation in question open and unguarded, that he entirely overlooked the *distinction* which runs through all of the cases in regard to *nuisances*, and that he *thus misled the jury?* Can it be law that the terms of a *private contract*, which the public never heard of, and which they know nothing whatever about, can control the rights of third persons and bring them under its sway. Can the court say, that because a party digs up a public highway, without any *special* authority whatever, that the act is *legalized* because he is not punished by indictment, or subjected to a civil suit?

Was not the *duty absolute* and *imperative* upon Robbins to see that the *excavation* which *he had caused* to be dug should be carefully guarded and protected. Was it the business of any body beside Robbins to see that the excavation was protected? If so, whose business was it? Was it Button's? Why, the excavation was dug in early spring, and there is no pretence that he was bound to protect it throughout the year, or any length of time. 3 Selden, 488–9. But, without pursuing this subject further, I conclude with the following summary:

1. Robbins, without any *special authority* whatever from the city authorities, caused an excavation to be made in a public street, in the city of Chicago, of about 100 feet long, 10 feet deep, and 12 feet wide. It was made *for his sole and exclusive use and benefit.* It was left *open, unguarded and unprotected by Robbins*, or those *under his control*, and one Woodbury walked into it in the night, while using due care in passing along the street, and was severely injured.

2. Robbins had been repeatedly warned by the city superintendent that the hole *was left open, unguarded*, and *unprotected*, and a *formal notice in writing* was sent to him by the city superintendent, *warning* and *cautioning* him about it.

3. Robbins *promised* to have the hole guarded and protected, but *did not.*

4. The *excavation* was *probably* carefully and skillfully dug; for it was dug under the *immediate supervision of Robbins' agent*, Van Osdell, who was employed by Robbins, and was *paid by him.* But the *manner* of digging the hole is *not* what is complained of. The complaint is, that after Robbins had been repeatedly warned and notified of the dangerous character of the excavation, he yet left it entirely open and unguarded, by which a stranger fell in and was injured.

5. To leave such a hole open, unguarded and unprotected in a public street in a great city, is a most reckless and careless act. And *such a hole*, left open, is not only

6. A nuisance but a *continuing* nuisance.

7. And if a *nuisance*, it is no answer for the owner of the property to make, that he did not *contract* to have a *nuisance* made. No contract can shield the owner of property from injuries arising from *nuisances* which are *created* on his own land; much less when a person *causes* or creates them, or does acts which *result* in a nuisance in the public street.

8. At the time of the accident, Robbins was in full possession of his premises, and no contract existed between himself and any person in regard to the *excavation*.

9. The city, owing to its *primary liability* to the public, having been obliged to pay for injuries occasioned in consequence of the street being in bad condition, and which was caused by Robbins interfering with the same; and

10. Robbins having been *notified* of the pendency of the suit brought by Woodbury against the city, and having failed to appear and make any defence, is

11. *Concluded* by the judgment of Woodbury.

12. The instructions of the court, which were excepted to by the plaintiff in error on the trial, *were, in view of the facts and circumstances of this case*, erroneous, and are not law.

13. For these reasons I respectfully submit to the court that the judgment in this case should be reversed and a new trial awarded.

ELLIOTT ANTHONY,
ATTORNEY FOR PLAINTIFF IN ERROR.

Anthony

14 Jl. 86. 87.

20 yd. coal destroyed
R.R. Co. held despa-
sable — not contractors
only

10 Frederick. 554.
Owner of Kansas
Pacific.

IN THE

UNITED STATES SUPREME COURT,

December Term, 1861.

THE CITY OF CHICAGO,
vs.
ALLEN ROBBINS,
} No. 183.

Brief for Defendant in Error—Allen Robbins.

This case presents the two following questions of law:

First. Is the owner of a lot of land, who employs a skillful and and competent contractor, (exercising an independent employment) to erect a building on such owner's lot, liable to third persons for injuries happening to them, by reason of the negligence of such contractor in the prosecution of the work?

Second. Was the area under the sidewalk along defendant's lot, as contracted to be built, a nuisance under the laws and ordinances of the city of Chicago, so as to render defendant liable for the injury to Woodbury, on the ground that he contracted for the construction of such nuisance?

The Court below instructed the jury that, as to the first question, the owner was *not* liable according to the weight of modern authority. (Page 30 of record).

This instruction was right, and is sustained by the following English cases:

Burgess v. *Gray*, 50 English Com. Law, 589 (1845). *Allen* v. *Hayward*, 53 Eng. Com. Law, 974 (1845). *Reedie* v. *The Railway Co.*, *&c.* 4 Exchequer, 243, 255 (1849). *Knight* v. *Fox*, 5 Exch.

725 (1850). *Overton* v. *Freeman*, 8 Law and Equity, 480 (1851–2). *Peachy* v. *Rowland*, 16 Law and Equity, 444 (1852–3).

The following late American decisions, are to the same effect :

Hilliard v. *Richardson*, 3 Gray, Mass. 349 (1855). *Linton* v. *Smith et al*, 8 Gray, 147. *Clark* v. *Fry*, 8 Ohio State Repts, 358 (1858). *Boswell et al* v. *Laird et al*, 8 California, 469 (1858). *Barry* v. *City of St. Louis*, 17 Missouri, 121 (1852). *Morgan* v. *Bowman*, 22 Missouri, 538 (1856). *Pawlet* v. *R. & B. R. R. Co.*, 28 Ver. 301 (1856). *Blake* vs. *Ferris*, 1 Selden, N. Y., 48 (1851). *McClevey* v. *Kent et al*, 3 Duer, 27 (1854).

And later than all these cases, and directly in point, is a case between this plaintiff in error and citizens of Chicago, decided in 1861 :

Scammon et al v. *The City of Chicago*, 25 Illinois, 424.

This decision was made after a full argument and by the local court, and we insist, that this Court shall not establish a different rule from that laid down and enforced by the State court ; because that rule is right in itself, and fully supported by authority ; and besides, it would lead to much confusion, if one rule on this subject is established by the State Courts, which must be presumed best to know what are the local interests in this question, and a different one by the Federal Courts.

The owner of the lot is exempted from liability, because he has no control over the manner of doing the work. The contractors are not his servants. He engages them to do a lawful work, and if the injury results solely from the manner of doing it, and the contractors perform it in their own way, free from the owner's direction and control, neither reason or authority will require the owner to answer for injuries resulting from no act or direction of his, but from the negligence of those wholly independent of him.

See also to the same effect, Redfield on Railways, 377–8–9. 2 Hilliard on Torts, 544–5.

In *Sturgis vs. Boyer et al*, 24 Howard, 110, 124, this Court seemed to adopt the principle we contend for, and held that the relation of principal and agent must exist, or some equivalent connection be shown, or the party sought to be charged, is not liable.

II.

There was no error in the instruction of the Court, that the jury might infer a license by the city of Chicago to the defendant, to make the excavation into which Woodbury fell, from the facts proved, so as to save the excavation from being, under the ordinances of the city, a nuisance, and thus exempt the defendant from liability on the ground that he did not authorize the making of a nuisance.

On this point, see Van Osdell's testimony, pages 19, 20 and 28 of the record; the contract of defendant with Button to erect the buildings, pages 24 and 25, and the charge of the Court on this point, pages 29 and 30.

The ordinances, referred to on pages 27 and 28 of record, were before the Supreme Court of the State of Illinois in the case of *Scammon et al* v. *The City of Chicago*, 25 Ills., as appears on page 427 of that volume, and that Court, upon a state of facts almost identical with the present case, decided that the owner of a lot is not liable for injuries happening to third persons in consequence of the negligence of his contractors, while building such an area under the sidewalks in that city.

This is upon the plain ground, that he only contracted for the performance of a lawful work.

We ask the Court to examine that case, and also *Clark* v. *Fry*, 8 Ohio State Reports, 358, which contain all the arguments we think necessary to urge on this point.

We understand that this Court, in such cases, follows the decision of the local courts, and the Supreme Court of Illinois having sanctioned, in the fullest manner, the construction of such sidewalks with areas, under the ordinances of the city of Chicago, this Court will not now declare the miles of similar areas built in that city, under these and no other laws and ordinances, unlawful and nuisances.

The work being lawful in itself—only the *manner of doing it* exposing others to danger—the defendant is not liable, according to the authorities cited above, for injuries happening from the negligence of those he engaged to perform it.

III.

The jury found the defendant not guilty, and we think the plain-

tiff in error had every legal advantage and right it was entitled to, under the facts and law, as will appear from the middle paragraph of the charge of the court, on page 31 of the record.

Under that charge, the jury found that "*the defendant had not* "*full knowledge of the state of the area, and of its exposed condition—*

"*That he was not warned by the agents of the city, not to suffer* "*it to remain in such an exposed condition.*" On no other ground could the defendant, according to reason and modern authority, be held liable, and the finding of the jury is conclusive against his liability on that ground.

IV.

It is urged on page 27 of brief for plaintiff in error, that at the time of the accident to Woodbury, the premises were not in possession of defendant's contractors, because Button's contract expired on the 1st September, while Woodbury was injured December 28, 1856.

It plainly appears from the testimony of Sundlebeck, pages 25 and 26, and of Gillespie, page 18, that the work was not completed, but actually in progress at the time of the accident.

Whether Button completed his contract within the time agreed upon or not, was no concern of this plaintiff in error. The true inquiry is: Who was in control of the work and possession of the premises at the time of the accident? and from whose negligence did the accident result?

The law and the jury exonerated the defendant in error from any liability.

This argument has been strictly confined to the only exceptions which appear in the record, and all found on pages 32 and 33 printed record.

SAMUEL W. FULLER,

For Defendant in Error.

SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

THE CITY OF CHICAGO,
Plaintiff in Error.

vs.

ALLEN ROBBINS,
Defendant in Error.

No. 183.

Abstract of Record, and Brief of Case.

Beach & Barnard, Printers, 14 South Clark Street, Chicago, Ill.

1861.

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1861.

SUPREME COURT OF THE UNITED STATES.

THE CITY OF CHICAGO,
Plaintiff in Error,

vs.

ALLEN ROBBINS,
Defendant in Error.

BRIEF OF CASE.

ABSTRACT OF RECORD.

The defendant contracted with one Button for the erection of an iron building, on the corner of South Wells and South Water streets, in the City of Chicago. In the course of the erection of the building, an excavation was made in the side-walk on Wells street, about one hundred feet in length, four feet in width, and about eight feet in depth; this excavation was made for cellarage and basement for the defendant's building, and was required to be done by the contract entered into between the defendant and Button his contractor; by that contract Button agreed to indemnify the plaintiff against all loss or damage by reason of any violation of the City Ordinances.

The excavation in the side-walk was left open and unprotected, and the City authorities on several occasions called the defendant's attention to its dangerous condition, and requested him to protect it. They also, on several occasions, placed boards over the excavation. After having his attention called to its dangerous condition,

the defendant promised to secure it against danger, and to properly protect it.

On the night of the 28th December, 1856, one Wm. H. Woodbury, in passing along the sidewalk, fell into the excavation and received severe injuries. It was at that time left entirely open and unprotected in any way.

Woodbury brought an action against the City in the Cook County Court of Common Pleas, and, at the June Term thereof, in the year 1857, recovered a judgment against the City for the sum of $15,000 damages, and $22.25 costs, together with $64.99 interest, and $108.70, which the City was obliged to pay, and did pay.

The defendant herein, had *notice* of the action commenced by Woodbury against the City, and was requested to defend the same, which he neglected to do.

This action is brought to recover of the defendant the amount of money paid by the plaintiff, as above stated, and interest.

The suit was originally brought in the Cook County Court of Common Pleas, in the City of Chicago, but was transferred to the United States on petition of the defendant Robbins.

PAGES OF PRINTED RECORD.

PAGES 1 & 2—Transcript from Cook County Court of Common Pleas, and petition of Robbins to transfer case.

PAGE 3—Certificate of Clerk of Cook County Court.

PAGES 4, 5, 6, 7, 8 & 9—Declaration of plaintiff—recites the facts in the case; alleges that Robbins, being the owner of property, undertook to erect a building, and caused a hole to be dug in the sidewalk, and on the 28th day of December, 1856, left it uncovered and unprotceted; alleges that on said day, one William H. Woodbury, while in the exercise of ordinary care and prudence, fell into the

hole; was greatly injured; brought a suit; alleges notice to Robbins of the commencement and pending of said suit; (see page 9, particularly, for notice;) alleges recovery of judgment, and payment by City.

PAGE 11—Bond of Robbins for transfer of suit.

PAGES 12 & 13—Plea of general issue.

PAGE 14—Jury sworn; case tried—but jury disagreed, and were discharged; this was October 13th, 1860.

PAGE 15—April 6th, 1860, case again came on to be tried; jury empanelled.

PAGE 16—Verdict of jury—not guilty.

PAGE 17—Motion for a new trial.

PAGES 17, 18, 19, 20 to 28th—Bill of exceptions, containing the evidence in the case.

PAGES 18 & 19—1st *witness*, M. M. Gillespie, swore that he knew the property of Robbins; knew about the excavation in the side-walk, and saw Woodbury, while going along the street, fall into the hole, and helped him out.

PAGES 19 & 20—2d *witness*, John M. Van Osdell, a witness for defendant, was called to explain the *plans* of the building, which were drawn by him for Robbins. The plans included the excavation in the side-walk for area; he superintended the erection of the building for Robbins, and gave certificates to those employed to do the work, for them to get their pay of Robbins.

PAGE 21—3d *witness*, Elihu Granger—was City Superintendent of Public Works, for City of Chicago, in 1856; knew Robbins; had a number of conversations with him in regard to the dangerous character of the hole; told him how it should be covered, and warned him that if he did not, somebody's neck would get broke. Mr. Granger had a permit shown him, from Boone, to some person, in the year 1855.*

* This permit had nothing whatever to do with the case, and no permit to make the excavation was ever given to Robbins by the City, or by any one.

PAGE 22—4th *witness*, Joshua Marsh — was City Attorney in 1856; testifies to *notifying* and informing Robbins of the commencement of the suit of Woodbury against the City.

PAGE 23—5th *witness*, Elias Shipman — resided in Chicago in 1856; was head clerk in Granger's office; testifies to nearing a conversation between Granger and Robbins, in which Mr. Granger told Mr. Robbins that the hole was dangerous, and that somebody's neck would be broken; and that Mr. Robbins said, "*That he would see to it*;" also testifies that, "*By direction of Mr. Granger, before this, I wrote him* (Robbins) *a note*, and put it in the post office, *notifying him of the danger of the area.* I recollect Mr. Granger and myself picking up plank there, and putting it across the end at corner; have pretty distinct recollection of doing it more than once — found them afterwards removed; there used to be gang plank running from side-walk to building."

PAGES 24 & 25—Defendants introduced a contract for doing the brick and stone work of the building, between Peter Button and Allen Robbins.

John H. Lindlebeck — was foreman for Button; testifies that when the iron men came on from New York to put on the grates, they removed the covering from over the area.

Col. Speed—testified that, in 1856, he was contractor under the Sewerage Commissions, and laid sewers near the building; he says, the area was kept covered with plank and joist; *sometimes they took my planks, and when I wanted them I took them;* there were barrels there, and barriers.

A. B. Cook—Had a contract with Robbins for the flagging; says, then was covering over side-walk and area; as fast as we covered it with flagging, Mr. Button went on and covered it over again.

John M. Van Osdell, re-called by defence—swears that he gave certificates of the work for payment; the counsel then introduced

an ordinance in relation to Stoops, Cellars, Doors, &c.; asked Mr. Van Osdell to explain it—he gave *his* understanding of it.

PAGES 28, 29, 30 & 31—Contains Judge's charge, in full, and is in the following language:

"There are not many facts in this case which are matters of controversy.

"Mr. Robbins, the defendant, was the owner, in 1856 and 1857, of the lot on the south-east corner of Wells and South Water streets. In February, 1856, he made a contract with Peter Button for the construction of a building on his lot, which included, as a part of it, a certain excavation of that portion of Wells street usually appropriated to the sidewalk, and which was to be under the sidewalk and covered with flag-stones, &c. When the building was completed, Mr. Button and other contractors, with their agents and servants, were engaged in completing the building and covering the excavation which had been made. While this was in progress, it seems that proper care was not taken to cover the hole which had thus been made in the street, and a young man by the name of Woodbury, in walking along the east side of Wells street, about 8 o'clock on the evening of the 28th December, 1856, was precipitated into the area, which had been left unguarded. In January following Mr. Woodbury instituted a suit against the city in the Court of Common Pleas of Cook County, and on the 24th of June, 1857, recovered a judgment against the city for the sum of fifteen thousand dollars and costs. The city having paid this judgment to the plaintiff in that suit for the damages which he sustained by the accident, has brought an action against Mr. Robbins to be indemnified for the amount thus paid. And this is the controversy in the case. The question to be determined is, whether Mr. Robbins is liable under the law and the evidence.

"The first thing to be ascertained is, whether Mr. Robbins had the right to cause the excavation to be made. That depends upon the fact whether he was authorized by the city. It *is conceded no ex-*

press authority or permission was given. The evidence on this point is, that no written permits were given to make these excavations. There was an ordinance which authorized certain things to be done, and the owners of lots *assumed* the right of excavating a portion of the sidewalk on the street and covering it with flag-stones or otherwise for the use of foot passengers, and appropriated to their own use the area beneath. There was no special rule or regulation upon this subject, unless to be found in the ordinance referred to. It is certainly a matter of regret that a question so serious and affecting to so great a degree, the interests of the city and of owners of street lots, should have been left in a condition thus vague and indefinite. It is apparent that many difficult and embarrassing questions may arise out of this appropriation to private uses of a portion of the public streets, and it were desirable that the rights of the public on the one hand, and of private persons on the other, should be regulated by specific ordinance. However, there seems no reason to doubt, from the evidence, that the city authorities knew that excavations were made. It was the subject of contracts by the owners of property, and of estimates and specifications by architects, noticed and examined by the superintendent of streets, and other city officers, well known and understood throughout the community; it was done without objection by the city or its officers. And the Court would lay down this rule upon this part of the case:

"If the facts show that areas were constructed with the knowledge of the city authorities, and more particularly under an ordinance, even though somewhat vague in its meaning, that the superintendent of streets gave directions in relation to them from time to time with the knowledge of the City Council, and that this particular area was excavated with the knowledge and acquiescence of the city authorities, they, in connection with the other facts proved, *may raise a presumption or inference* that there *was a license* or *permission on the part of the city to the defendant to make the excavation, subject of course, to the usual rules and regulations existing or prescribed in such cases.*

"If the defendant caused the excavation to be made without

authority, express or implied, from the city, then it is admitted he did an unlawful act in constructing his area, and he would be responsible for the consequences which would follow. But if he were only doing a lawful act, then a different rule may prevail.

"If he had a right to construct the vaults, then it may become material to ascertain the relation of the defendant to the work at the time of the accident.

"It seems to have been formerly held in England, that whenever the owner of land made a contract for building, he was considered responsible for any negligence of the servants of the contractor, however far they might be removed in relation to him by other and different contracts or service. *Bush vs. Steinman*, 3 Bosanquet & Puller. But the weight of modern authority is, that the immediate relations of master and servant, or of principal and agent, must exist in order to render the owner liable. *The rule now established is, that if the owner makes a contract for building or repairing a house, and the contractor has an independent employment and service, and selects his own agents and servants without reference to the owner, the latter is not responsible for the negligence of the servants of the contractor, unless he was connected with such negligence personally by some act of commission or omission. There are one or two cases decided by the Supreme Court of Illinois, which seems to hold railroad corporations liable for the acts of the workmen of the contractors, but they may be said to rest on special circumstances, and perhaps do not trench on the rule referred to.*

"What, then, was the position of the defendant as to this excavation? He had let the work out by contract. The work was to be finished, by the terms of the contract, in September, 1856, but it was not, in fact, completed till February, 1857. It does not clearly appear how the time was extended, but the fact is fully proved, and not denied, that the contractors and their workmen remained on the work till the beginning of 1857. *If, then, the contractors were in possession and control of the premises with their servants and agents, and were in their employment independent of*

the defendant at the time of the accident, and the defendant was not concerned personally in the negligence which caused it, it follows, from what has been said, that he could not be held responsible for it. How the fact actually was in this respect, the Court leaves with the jury to decide under the evidence, as it leaves all the other facts in the case. It is proper to refer to a portion of the evidence which may have a very important bearing on the result. According to the testimony of Mr. Granger and Mr. Shipman, who were both in official positions in 1856, under the city, the condition of the side-walk was the subject of conversation with the defendant before the accident occurred. Mr. Granger, the superintendent of streets, spoke to the defendant and to the foreman of the work of the dangerous state of the covering over the area. The defendant admitted it, but stated that it was the business of the men to attend to it. The testimony of Mr. Shipman is, that late in the Fall of 1856, Mr. Granger warned the defendant of the great danger there was to persons walking along the street there. His language was very strong—that somebody's neck would be broken if the covering was not attended to; and the defendant said he would see to it. During this conversation or conversations — and the jury will determine whether there was more than one — the defendant intimated that the men were careless about covering the area. Mr. Shipman also says that, at the request of Mr. Granger, he addressed the defendant a note through the post office on the subject. I think if these things are true it seriously affects the question as to the liability of the defendant. It strikes me that under these circumstances there is great reason in saying the owner shall take care of his own property and of his own contractors, and see to it that their negligence do not cause injury to the public.

"It looks like a hard rule to compel the city, under this state of facts, to search out the immediate principal of the employees who has been guilty of the negligence, though he may be found in a dozen removes from the owner of the property, and though he may or may not be responsible, and to say that none but him and his employees shall be answerable for the consequences. It is conceded on all hands that the leaving the area unguarded in the way it was,

was such an act of carelessness as to amount to a nuisance. If the fact be found by the jury, that the defendant had full knowledge of the state of the area, and of its exposed condition, and was warned by the agents of the city not to suffer it to remain in such a dangerous situation, and still, after such warning, it was suffered to continue, then, my opinion is, it was his duty, as the owner of the lot and the party who had caused the excavation to be made in connection with a part of his building, to see that it was properly and safely covered, and if he did not, that he should be held liable for the consequences of his neglect.

"There is another point which should be considered, and that is, how far the city was itself in fault. If the accident was caused by the joint fault or neglect of the city and the defendant, or his employees, then the plaintiff cannot recover. But in looking at this point of the case, the jury will bear in mind the nature and character of the subject. The city has the care over the streets, and should not imperil in any way, by its own neglect, the life or limb of the citizen, but it is apparent that the owners of property must have the opportunity of constructing and repairing their buildings, and for that purpose must have the exclusive use of a portion of the street for a limited time. It may be necessary, to take up and remove the sidewalk to make excavations, and do other acts upon the public streets. Now, it is almost impossible to lay down any absolute or fixed rule as to the degree of care which should be exercised by the city authorities in such a case as is before us. It is manifest, while the excavation is going on, walls in process of construction, flag-stones and gratings being put down, that there are constant changes going on from day to day, and from hour to hour, even. It could hardly be required or expected that the city would keep an officer on the spot at all hours of the day and night, to prevent the passenger from falling into any space which might be left open. There must be a reasonable view taken of the duty of the city in this particular, taking into consideration the work to be done and the means by which it is accomplished. It is for the jury to say whether, applying these rules to this part of the case, the fault or negligence of the city contribute, in any considerable degree, to

produce the injury complained of; if it did, then the plaintiff cannot recover. The rule is, that one of two joint wrong-doers cannot have indemnity or contribution from the other. [And the Court, whilst leaving the fact as to whether there was fault or negligence on the part of the city to the jury, gave various illustrations upon this part of the case.] There is only one other question remaining, and that is, as to the effect of the verdict and judgment in the case of *Woodbury vs. The City* in the Court of Common Pleas. If the defendant, under the law and evidence as stated by the Court, was liable for the damage sustained by Woodbury, and had full notice of the pendency of that suit, and had an opportunity of defending, then he is bound by that judgment. If the defendant shall be considered liable, the city is entitled to full indemnity, which is the amount of the judgment paid and costs, with interest from the time of payment; that is, from the 20th of July, 1857.

"I have thus given you my views of the law of this case — the facts I leave to the jury. I have only referred to them by way of illustration."

To which charge and instructions of the Court the said plaintiff then and there filed the following objections:

1. The said plaintiff objects and excepts to the instruction of the Court, wherein he charges that the jury may, from the facts, raise the presumption or infer that *that* there was a license or permission on the part of the city to the defendant to make the excavation.

2. The plaintiff further objected and excepted to the instruction of the Court touching the case of *Bush vs. Steinman*, in the 3d of Bousanquet & Puller, and to the further instruction of said Court that the rule which governed was, that if the owner makes a contract for building or repairing a house, and the contractor has an independent employment and service, and selects his own agents and servants without reference to the owner, the latter is not responsible for the negligence of the servant of the contractor, unless he were

connected with such negligence personally by some act of commission or omission.

The said plaintiff further excepts to the following languaged as used by said Judge in his said charge:

"If, then, the contractor were in possession and control of the premises, with their servants and agents, and were in their employment, independent of the defendant at the time of the accident, and the defendant was not concerned personally in the negligence which caused it, it follows, from what has been said, that he could not be held responsible for it."

The said plaintiff further excepts to so much of the said charge of the Court as leaves the question of joint negligence on the part of the plaintiff and defendant to the jury.

Exceptions, as specially set forth, allowed.

THOMAS DRUMMOND, [SEAL]

PAGE 33—Writ of Error.

" 34—Bond for Costs.

" 35—Citation and service,

" 36—Certificate.

SUPREME COURT OF THE UNITED STATES.

THE CITY OF CHICAGO, *Plaintiff in Error,* vs. ALLEN ROBBINS, *Defendant in Error.*	*In Error to the Circuit Court of the United States for the Northern District of Illinois.*

APPELLANT'S POINTS AND AUTHORITIES.

Statement of Case.

This was an action of trespass, on the case originally commenced in the Cook County Court of Common Pleas, in the City of Chicago, by the City of Chicago against Allen Robbins, to recover of said Robbins the amount of a judgment of $15,000, and costs, which the city had been compelled to pay by reason of injuries done to one William H. Woodbury, who had fallen into an open area, in the side walk, which area and excavation had been made *by the direction of Robbins*, for the purpose of making vaults and of affording light to the basement of a large iron building, which Robbins was at that time constructing, at the corner of Wells and South Water streets, in the city of Chicago, and which had been left open and unprotected by Mr. Robbins, or his agents, or contractors.

On the night of the 28th of December, 1856, Mr. Woodbury, in passing along the street, fell into the open area, and was very severely injured. He sued the city and recovered a judgment for $15,000 and costs, which the city afterwards paid.

The *city notified* Mr. Robbins of the pendency of the suit brought against *it by Woodbury*, but he failed to defend it. The city defended the suit, but with the result above stated. After *this* suit had been commenced against Mr. Robbins, he filed his petition in the Cook County Court of Common Pleas, alleging that he was a citizen of the State of New York, and the court thereupon transferred the case to the United States Circuit Court. See page 2 of Record.

The declaration on pages 4, 5, 6, 7, 8, 9 and 10, contains a history of the case as is here stated, and claims to recover of Robbins the amount of the judgment, $15,000.

Costs of Court	22.35
Interest on the judgement up to the time it was paid	64.99
Sheriff's fees	108.70

All of which had been paid by the City of Chicago, *on account* of the *fault* and *neglect* of *Robbins*.

I.

The first position which the plaintiff assumes in this case is, that

The City of Chicago is *primarily* bound to repair all defects in the highways, remove all obstructions and abate all nuisances thereon which might prove injurious to the public or to individuals and would *primarily* be liable to an injured party for all damages resulting from a neglect of that duty.

Browning v. *City of Springfield*, 17 Ill. 143.

From this, it follows, that the city is invested with the power to control the streets, and has the right to *demand* of any person who causes any defects in the highways, that they be repaired; that obstructions be removed, and nuisances be abated; and in case of the neglect of the person upon whom such demand is made to comply therewith, the city may itself repair the defect, remove the obstruction and abate the nuisance, and recover of the delinquent *all the expenses* which it incurred in consequence of such neglect or refusal.

II.

From this, it also follows, that if *individuals* so use the streets and highways of a city that damage has resulted to a stranger, which the *city* by virtue of its general duty to the public has been obliged to pay, they may and should be *liable over* to the city for all damages which they have caused.

The general principles controling individuals in the use of the street or highway fronting their premises, are the same as those which regulate the manner in which their own property is to be enjoyed, and the maxim "*Sic utere tuo ut alienum non laedas*," is in both cases applicable. The right in any case, or for any purpose, of an individual to make excavations in the streets fronting his premises, is a relaxation of the earlier rules of the common law, and is only allowed where necessity demands it, and must be exercised with extraordinary care.

Any obstruction of the streets, or any defects therein, which impair or injuriously affect the free enjoyment and use thereof by the public, are nuisances, and as such may be abated by the corporation, or by any person sustaining special damage thereby.

Any excavation in a street or sidewalk, obstructing the free use thereof, or rendering it dangerous is *per se* a *nuisance*, and in order to render it anything less, or to justify the act in making it, or causing it to be made, it must be so protected that individuals shall

not suffer damage in consequence of it. It is not in such case the *manner* in which the excavation is made which may constitute it a nuisance, or not, according to circumstances.

However carefully a pit or hole may be dug in the street, it is a nuisance *if left in that condition, as much so as if negligently dug*, and can only be divested of that character by being covered or otherwise protected. And so it will be seen that the liability of a person in such case would not be made to depend upon the *manner* in which the work was done, but upon the *work itself*, that being the *immediate* cause of the injury, and his protection from the liability would be secured, if at all, by the careful and prudent manner in which he protected the work after it was done.

A party in the enjoyment of his own property, is liable, either to indictment, or at the suit of an individual who has sustained special damage thereby, for erecting, causing to be erected, or *continuing* a nuisance thereon, and the same rule obtains in relation to the public highways.

This liability in either case is made to depend upon the facts that the party charged, either made, or caused the nuisance to be made, or continued it, and it is upon the determination of this question that the great difficulty in all cases of this character rests.

The general rule of law is, that what a man does by his agent he does by himself. That the principal is liable for the acts of his agent within the scope of his emyloyment, and the master for the acts of his servant, and in such cases the maxim *respondent superior* applies.

Now, if A. contract with B. to furnish the materials and build him a house according to specifications and plans, and A. himself have no control over B. as to the manner in which the contract is to be performed, it may be that A. would not be liable to a third person for an injury sustained in consequence of the negligent manner in which either B. or his servants had conducted the work, for the reasons, that in such a case a contractor cannot properly be

considered the agent of his employer, and that the injury was not the result of building the house, and for which alone the employer had contracted, but of the negligent *manner* in which it was done, and for which he had *not* contracted, and that therefore it could not be said that he either inflicted the injury, or caused it to be done.

Had A. contracted to have the building erected in a particular manner, and that manner had been defective, and a third person had sustained injury in consequence of its being so erected, A. would have been clearly liable, for in that case he would have *caused* the injury, inasmuch as he contracted for *the very act* from which the injury proceeded.

These rules, however, are more particularly applicable to that class of cases where the thing producing the injury is not a nuisance, for it is a well settled principle that the owner of real property is liable for the *continuance of a nuisance* thereon, no matter by whom created; that no man should permit a nuisance on his own premises, that he is bound so to use and control them that none shall exist there, and that no matter by whom created or caused, whether by himself or strangers, he is liable for all damages resulting from it.

As we have already stated, the leading question in cases of this character is: Who caused the injury?

If it were produced by the thing which the employer caused to be done by virtue of the contract, then he is liable. If by the *negligent manner* in which the thing was done, then (if the act complained of does not amount to a nuisance) it may be that the contractor is alone liable. Upon that point, however, there is, as we shall have occasion hereafter to notice, much conflict of authority.

Upon the application of these principles alone, and without reference to other important features in the case, there would seem to be no doubt of the plaintiff's right of recovery.

The defendant caused the thing to be done which produced the

injury to Woodbury, to wit: the *excavation in the side-walk;* the injury resulted not from the fact that the excavation had been negligently or unskilfully made, but from the fact *that it was made;* not from the *manner* in which the thing was done, but from *the thing itself*, and which *by the very terms of the contract* the defendant caused to be done.

But still further, *the excavation* was a nuisance; and whether the defendant caused it to be done or not, he is liable for all damages resulting from its continuance.

The plaintiff's right to recover may safely be placed upon other grounds. The acts of the defendant show affirmatively that he had not parted with all control over the work. He agreed to protect the excavation and would be clearly liable for all damages resulting from a breach of that agreement.

MAINE.

State of Maine vs. Inhabitants of Gorham, 37 Maine, 451.
39 Maine, 253.

VERMONT.

Willard vs. Town of Newberry, 22 Vt. 458.
See also 25 Vt. 377 and
Batty vs. Duxbury, 24 Vt. 155.

The principle which these cases settle is, that the town or city is primarily liable to a traveler, but that the town has its remedy against all individuals who cause damage by reason of obstructing or interfering with the street in any way.

MASSACHUSETTS.

Lowell vs. The Boston & Lowell R. R. Co., 23 Pick. 24.

III.

In the trial of this case much stress was laid upon the point that Robbins had an order to erect his building, let the job out to various *cotractors*, who undertook to do various and distinct things. One was to do the mason work—one the wood work. One was to dig the hole in the side-walk and make the area for vaults and cellarage, and put the grating on over the area, and it was then argued that if any person was injured through the negligence of any of these various contractors or their workmen, that it was not Robbins' fault, and that he could not be held liable.

The instructions of the court upon this subject, which were excepted to, are expressive of the same idea, and are as the plaintiff in error contends—fundamentally wrong so far as they apply to the facts in *this* case.

The plaintiff is ready to admit that it may be the law, that when the owner of a piece of property undertakes to erect a building upon his own land, and he lets the job out to various contractors, who have separate and independent employments, and who select their own servants without reference to the owner, and that in the course of their employment, they or their servants are careless and negligent, whereby an injury is produced to a third party, that the owner of the land may not be liable: but suppose the same owner of the land takes the same identical contractors, workmen, agents and servants, and lets out to them the job of digging a *hole in the street*, where hundreds and thousands of strangers pass and repass every hour of the day and night, how then would the law be? Is it not perfectly apparent, that to erect a house *wholly* upon one's own premises, that it would be a lawful act, while in the other, the digging up of a portion of a great traveled thoroughfare, and *leaving the excavation unprotected*, would constitute it a nuisance?

In the language of the court in the case of *Storrs vs. The City of Utica*, 17 New York Reports, page 108:

"The cause of the accident, therefore, was *not* in the *manner* in which the work was carried on by the laborers; if it had been, their immediate employer, and he only, was liable for the injury. But in a sense strictly logical, as it seems to me, the *accident* was the *result of the work itself*, however skilfully performed. A *ditch* cannot be dug in a public street and *left open* and *unguarded* at night, without imminent danger of such casualities. If they do occur, *who* is the author of the mischief? Is it *not* he *who causes the ditch* to be dug, whether he *does it with his own hands, employs* laborers or lets it out by contract? If by contract, then I admit that the contractor must respond to third parties, if his servants or laborers are negligent in the immediate execution of the work. But the *ultimate superior* or *proprietor* first determines that the excavation shall be made, and then he *selects his own* contractor. Can he escapé responsibility for putting a public street in a condition dangerous for travel at night, by *interposing the contract* which *he himself has made for the very thing* which creates the danger? I should answer this question in the negative.

"He may insert in the agreement a clause that the contractor shall provide proper lights and guards, but I do not see how even *that* can change the principle.

"The contractor in that case would be liable to indemnify his employer for accidents occasioned by his neglect of the stipulation, and perhaps also liable directly to persons injured.

"He might even be liable to the latter for leaving the ditch unguarded at night, without any stipulation on his part. But granting all this, it has no tendency, in my judgment, to shield the ultimate superior or author of the work from responsibility."

In the case of *Vanderpall vs. Husson*, 28th Barbour, 198, Justice Hogeboom says:

"The general rule is, that where the work is done under a contract, and the injury occurs from the act or negligence of the servants of the contractor, and not those of the owner, the owner is not responsible," quoting cases—

Norton vs. Wiswall, 26 Barb. 618.
Blake vs. Ferris, 1 Selden, 48.
Pock vs. The Mayor of New York, 4 Sel., 222.
Kelly v. Mayor of New York, 1 Kern, 432.

"But there are EXCEPTIONS to the general rule where *the work* or execution is itself a nuisance, or where the injury was itself a necessary result of the contract, and in some cases not material to be noticed."

Stevens vs. Armstrong, 2 Selden, 436.
City of Buffalo vs. Holloway, 3 Selden, 493.
Congreve vs. Morgan, 5 Duer. 495.

In the State of Illinois the owner of property has been held liable for the negligence of the servants of contractors.

In *Hinde et al vs. The Wabash Nav. Co.*, 15 Ill. 72, the court, CATON, J., say: "It is true that a contractor is not in all cases, and for all purposes, to be considered the servant of the principal or employer, so as to subject the latter to liability for his tortious acts, and this is generally the case where the contract is in reference to the management of personal property."

The court then refer to *Bush vs. Steinman*, and approve that case so far as it relates to real property, and after citing the cases succeeding *Bush vs. Steinman*, remark: "Thus we see that cases are not wanting to maintain upon common law principles the liability of the Navigation Co., who are the owners of the improvement for the tortious acts of the contractors, done in the execution of their contract, and near to and in respect of the company's premises."

Se also *Tuller vs. Vogt*, 13 Ill. 285.
Johnson vs. Barber, 5 Gill. 426.
City of Alton vs. Mulledy, 21 Ill. 76.

The Chicago, St. Paul & Fond du Lac R. R. Co. plaintiff in error, vs. Owen McCarthy, defendant in error, 20 Ill. 385.

It appeared in this case that the contractors engaged in the con-

struction of the defendant's railroad entered upon the enclosed parts of plaintiff's farm, where the line of said road was located, for the purpose of constructing said road, during the month of August, 1856; that they took the fences down at the points where the line entered said enclosure and left them down during most of the time they were doing said work, or if they put them up it was done in a very negligent and careless manner; that the fences around said enclosure were also thrown and taken down at other points by men engaged on said work, and that in consequence of said taking down of said fences, the crops growing within said enclosure were damaged by cattle entering said enclosure from the highways and common lands adjoining the plaintiff's farm. It also appeared, in proof on the part of the defendant, that the work of constructing the entire length of said road from Chicago to Janesville was let to Page & Co., contractors, and that said damage was occasioned by the carelessness and negligence of the men in the employ of Page & Co., who were engaged in constructing the road for the company.

The opinion of the court was delivered by BREESE, J.—

"The evidence discloses a case of great negligence on the part of the contractors of this company, on whom the responsibility is attempted to be shifted. To railroad companies are granted extraordinary privileges, and they must be held so to exercise them as to do the least possible amount of injury to others. The maxim, '*Sic utere tuo ut alienum non loedas*,' well applies. The contractors are the servants of the company, and authorized by law, being such servants, to enter upon the defendant's land and take down his fences, if necessary, but the company must be responsible for the consequences of the act; the contractors have no right there except through the grant to the company, and of course are the servants and agents of the company in doing that particular work. Their laborer's acts are properly chargeable to the company."

But it was contended on the trial of this case, and the court so instructed the jury, that if "the particular area was excavated with the knowledge and acquiescence of the city authorities, they, in connection with other facts proved, may raise a *presumption* or in-

ference that there was a license or permission on the part of the city to the defendant to make the excavation, subject, of course, to the usual rules and regulations existing or prescribed in such cases."—(Page 29 of record.)

Now, what are the facts in this case to warrant the court in giving this instruction?—why simply this. Mr. Van Osdell, the architect of Mr. Robbins, who drew the plans for the building, including the area in question, swears that he had lived in Chicago about fifteen years; had been in the habit of making these vaults for forty years; says "there have been constructed in Chicago, within the last six years, of buildings which have these areas, before this building was concluded, two thousand lineal feet that year." After the amendment of the ordinance the areas were five feet. No permits since ever been taken out. Bouton, while he was city superintendent, covered a number of these areas with grating—it was in the line of his business; never knew of any objection on the part of any of the city officers; the fact was known to members of the Council.—(Page 20 of record.)

Now, *what fact* was known to members of the City Council? Why, that *vaults and areas had been constructed in the sidewalks in the city.* There is no pretense that a knowledge of the *dangerous* character of this particular area was ever brought home to the Common Council, who controlled the affairs of the city and the city officers. He says, however, "no objection was made in this instance by any city official." Let us see, now, if this is correct. Look at the testimony of Elihu Granger, on page 20 and 21 of record, and of Elias Shipman, page 23 of record.

Mr. Granger says that he was city superintendent in 1856; passed two or three times a day on my way home; knows Robbins; saw Robbins occasionally while the building was being erected; there was an *area* four or five feet next the building after the sidewalk was laid. I had conversations with Robbins about every time I met him there; my impression is I had one with him after the flagging was laid, *about the area* "as to *how it could be covered.*" I think I said that it *ought* to be *covered up with sticks across and*

plank on the sticks; and think it was done to some extent, but "they opened it when they were putting on the iron grating. I considered it *my duty*, as city superintendent, to *warn him against any accident that could happen.*"

Mr. Granger does not recollect distinctly his orders to Shipman, his head clerk, upon the subject of notifying Robbins, but says he frequently did do such things. Mr. Granger says that he told Mr. Robbins that "if it was sleety and people were passing rapidly they might slip in — that somebody's neck would be broken if the covering was not attended to, and *he said he* would attend to it," but said the matter was in the hands of his contractor. Mr. Granger says: "I spoke to him as city superintendent, as *I had frequently before.*"

Something was then said about permits from the mayor to occupy a portion of the streets for depositing building material, and one was shown Mr. Granger from Mayor Boone to Peter S. Button, dated February 25th, 1856; but the court will take notice that *the permit*, shown to the witness and spoken of by him, has *no connection* whatever with *this* case. Woodbury having been injured in December, *prior* to any permit being given to anybody for anything; indeed, it is not pretended that any *express* authority of any kind was ever obtained from the City Council or from anybody.

Now, look at the testimony of Mr. Shipman. Mr. Shipman says: "Resided here in 1856 — head clerk in Granger's office; know R. (meaning Robbins) by sight, and the buildings; lived with Granger on North Side; passed the premises four times and usually six times a day. The flagging on Wells street was commenced at east end sometime in September, may be a little later; it was completed about 1st November, I think, on both fronts; the area was usually entirely open until after the grating was all done. Sometime after the flagging was done, and before the concrete floor of area was laid, I was present at a conversation with Granger and R. exactly at corner of building — north-west corner of building. *Granger spoke about the danger of the area being open; that it was dangerous* —don't pretend to speak with accuracy as to the language — *some-*

body's neck or limb would be broken or paid for. The substance was that R. said *that he would see to it. By direction of Mr. Granger, before this,* I wrote him a note and put it in the Post office, *notifying him of the danger of the area.* I recollect Mr. G. and myself picking up plank there and putting it across the end at corner—have pretty distinct recollection of doing it more than once; *found them afterwards removed.* There used to be gang planks running from sidewalk to building; I don't remember ever seeing the area covered till it was covered by *grating.*"

Look also at the testimony of John H. Sendlebeck, (page 25 and 26 of record,) a witness for the defendant. He says that the area was covered with joists, but that "when the iron men came on to put on the grates *they removed the joists,* and occasionally a joist was removed as the carpenters wanted to use it, but it was afterwards replaced. I acted under Mr. Button's orders. *Mr. Granger once spoke to me about it;* he said *we must keep it covered* or Button would be liable *or the owner* would. I presume there were some places open when Granger spoke to me; perhps, some joists had been removed."

Now, what kind of a *license* does this evidence show? Does it show that Robbins had any permission to dig up the streets for the purpose of constructing vaults for his building, and *to leave* the excavation unguarded and unprotected? Did the city acquiesce in any such thing; does not the evidence show that Mr. Granger, the city superintendent, and his head clerk, repeatedly *notified* Mr. Robbins and his workmen of the dangerous character of the area, and not only fixed it themselves, but told Robbins how it should be protected?

It nowhere appears that the mayor or a *single member* of the Common Council ever knew anything about this area at all; it only appears that Granger and his head clerk knew it, and that they kept continually warning Robbins and his men of its danger.

A Common Council is a legislative body, and in order to bring

notice home to the city corporation properly, it should be by notifying the Common Council; but this was not done.

The defendant further attempted to make out a show of permission by introducing an ordinance of the city, and then calling up Mr. Van Osdell to interpret it and explain its meaning; all this evidence was *objected* to in the trial, but by some inadvertence it does not appear in the record.

Now, this ordinance has nothing, whatever, to do with digging areas in the sidewalks of the city, and nobody, I presume, but Mr. Van Osdell ever thought of such a thing; its very wording excludes any such construction, and as a matter of fact it does not apply to any such thing. The ordinance was designed and is used to prevent persons from occupying sidewalks by the construction of "porchs," "gallerys," leading down into basements; "stoops," "steps," "cellar doors," "stair-railing"; and it expressly provides that *no* one of these shall be *allowed to extend into or upon any sidewalk* where the street is less than seventy feet wide, &c.

There is no ambiguity at all in the language used, and Mr. Van Osdell, in his zeal, passed far beyond the limits of his profession, when he undertook to expound the meaning of this ordinance, and especially when he said that the construction which he put upon the ordinance was the same that the *city authorities had always put upon it.*

But there is one thing certain, which is *perfectly apparent* in this case, and which the court, in its charge to the jury, entirely overlooked, and that is, that if the city authorities *did* permit Mr. Robbins to dig the area, it *did not grant him*, or his workmen, or contractors, or anybody else, permission to *leave* it, in a *dangerous* condition, *open*, *unguarded* and *unprotected*. This *point* was entirely overlooked by the court, and had a tendency to mislead the jury, and did mislead them.

But without pursuing this point further, I now call the attention

of the court to two cases which, I think, are entirely decisive of this case. The first is *Congreve vs. Smith*, 18 N. Y. 79; the second is *Congreve vs. Morgan & Smith*, 18 N. Y. 84. In deciding the first of those cases STRONG, Justice, says:

"The area was under the surface of the public street, and was maintained for the benefit of the property of the defendant, and the stone was placed over it under contract with the defendants, for the completion of the defendant's building in pursuance of the contract. No license from the city for the area was proved.

"It certainly is just that persons *who, without special authority, make or continue* a covered excavation in a covered street or highway for a private purpose, should be responsible for all injuries to individuals resulting from the street or highway being thereby less safe for its appropriate use, there being no negligence by the parties injured, and I entertain no doubt that a liability to that extent is imposed on them by law. Such is clearly the legal responsibility for placing objects upon the surface of the ground, obstructing the full and free enjoyment of the easement, and there does not appear to be any distinction in principle as to the liability of a party for an act making the use of the easement dangerous, arising from the mode in which it is done, whether by objects upon or over the surface, which may be run upon or against, or by holes in the earth into which persons may fall.

"The general doctrine is that the public are entitled to the street or highway in the condition they placed it, and whoever, *without special authority*, materially obstructs it, or renders its use hazardous by doing anything upon, above, or below the surface, is guilty of a *nuisance;* and, as in all other cases of public nuisance, individuals sustaining special damage from it, without want of due care to avoid injury, have a remedy by action against the author or person continuing the nuisance. No question of negligence can arise, the fact being wrongful. It is as much a wrong to impair the safety of a street by undermining it as by placing objects upon it. There can be no difference in regard to the nature of the act, or the rule

of liability wbether the fee of the land within the limits of its easement is in a municipal corporation or in him by whom the act complained of was done. In either case the act of injuring the easement is illegal.

"The case of *Dygert vs. Schenck*, 23 Wend. 446, appears to be directly in point. In that case it was held that the defendant, who had dug a race across a pubiic road over his own land, to conduct water to his mill, and built a bridge across it, was liable for an injury sustained in consequence of the bridge being out of repair.

"The court, by COWEN, J., said that in suffering the bridge to become unsafe 'the defendant came short of his obligation to the public. Any act of an individual done to the highway, if it detract from the safety of travelers, is a nuisance.' And again — 'special damage arising from it, therefore, furnishes ground for private action without regard to the question of negligence in him who digs it. The utmost care to prevent mischief will not protect him if the injury happen without gross carelessness on the part of the sufferer.'

"*It is no answer to the present action that the covering to the area was done under the contractor, who had contracted to do the work properly*, and that the defendunts are not responsible for the negligence of the contractor's servants. The *act was that of the defendants; they procured it to be done*, and do not appear to have objected to it. Besides, the action may well stand on the basis of continuing the area and the stone covering it, they making the easement unsafe compared with what it otherwise would have been. That is a sufficient ground of liability. The defendants were bound at their peril to make and at all times keep the street as safe as it would have been if the area had not been constructed.

"So also in *Congreve vs. Morgan & Smith*, 18 N. Y. R. 84, where the facts were substantially the same as in *Congreve vs. Smith*. The court, STRONG, J., say: 'It is made a point on the part of the defendants, in addition to the questions raised in the other case, that, although the stone over the area was unsafe for the purpose of a covering, as found by the jury, if it was fractured after it was laid

by the wrongful acts of others, and the injury arose from this cause, the defendants would not be liable, at least not without proof that they had notice of its condition, and were under an obligation to repair.'

"The liability of the defendants does not depend upon their negligence either in providing an unsuitable stone, or in continuing the use of it after it had become unsuitable from any cause, but from the fact that the stone was unsafe at the time the injury occurred, and clearly occasioned the injury. *When the stone became unsafe for any reason, the area was a public nuisance, in like manner as any injury or obstruction to the street would be;* and the defendants who continued it were responsible for it to the public and to individvals, recovering special damages from it without negligence on their part for the damage sustained. *They were bound at their peril to keep the area covered in such a manner that it would be as safe as if the area had not been built.* This measure of liability is essential to the public interests, and the protection of rights to individuals.

"*Nelson, plaintiff in error, vs. Godfrey, defendant in error*, 12 Illinois, 20, carries the doctrine of liability of persons who have caused obstructions to be made upon the highway to its fullest extent. The facts of the case are sufficiently stated in the opinion of the court, which was delivered by CATON, J.:—

"'This action was brought to recover damages resulting to the plaintiff by reason of an excavation for a coal cellar, made by the defendant in the sidewalk in front of his premises on State street, in the city of Alton, through which the water from the gutter of the street passed into the defendant's cellar, and thence through several other cellars into that of the plaintiff, and did the damage complained of. We think the plaintiff was clearly entitled to recover, and had the jury understood the law as applicable to the case, they could not have avoided rendering a verdict in his favor. * * *

"We are not prepared to admit that the defendant could, by reason of his ownership of the adjoining property, claim the absolute right to take up the sidewalk and extend his coal cellar under it,

but as such a privilege is of great convenience in a city, and may with proper care be exercised with little or no inconvenience to the public, we think that authority to make such cellars may be implied in the absence of any action of the corporate authorities to the contrary, they having been aware of the progress of the work.

"But while we infer a license thus to use a part of the public street, it is on the condition that the person doing so should use more than ordinary care and expedition in the prosecution of the work. Neither the public or other individual can derive any possible advantage from such a use of the sidewalk, but *it is solely for the defendant's benefit*, and he must see to it that he *does not endanger the safety of others*, and that he incommodes the public as little as possible. *It is a familiar principle, that when one enjoys a privilege as a matter of favor*, in consideration that he alone can enjoy the benefit, he is required to use *extraordinary care in the exercise of the privilege.*'"

See also *Irwin vs. Sprigg*, 6 Gill. 200.
City of Alton vs. Mulledy, 21 Ill. 76.

The real distinction in all this class of cases is firmly stated by WILDE B., in the case of *Hole vs. Sittingbourne & Thames R. R. Co.*, found in vol. 9, No. 13 of the Weekly Reporter, published in London. The case was similar to the one at bar, and on deciding it he said:

"The real distinction in these cases is this: When the injury is occasioned by the negligent act of a servant of the contractor, collateral to the execution of the work which the contractor is engaged to perform, then the contractor, his master, is liable; but if the injury by the doing that which the contractor was employed to do, then the person who employed him is responsible; in other words, where the mischief arises from the improper or defective doing of that which is ordered, the person ordering the doing of it is answerable. Here the defendants employed the contractor to build a bridge, and it was so made as to be an obstruction to the navigation. Although it may be that what the contractor did was an insufficient carrying out of the delegated authority, still it was done under and

pursuant to that authority, and the consequences are the same as if the defendants had themselves done the act. *It is the same in principle as the case of a person requiring another to set up a structure which is regarded by the law as a nuisance; then the person ordering it to be done would be responsible. It is no answer for the defendants to say, 'we did not* order it to be so done as to constitute a nuisance'; it is *sufficient* that they *ordered the doing of the act*, and *that it was* a nuisance.

And now tested by these decisions, how stand the instructions of the court in this case?

On page 30 of the record, the court said:

"It seems to have been formerly held in England, that whenever the owner of land made a contract for building, he was considered responsible for any negligence of the servants of the contractor, however far they might be removed in relation to him by other and different contracts or service. *Bush vs. Steinman*, 3 Bosanquet & Fuller. But the weight of modern authority is that the immediate relations of master and servant, or of principal and agent, must exist in order to render the owner liable.

"*The rule now established is, that if the owner makes a contract for building or repairing a house, and the contractor has an independent employment and service, and selects his own agents and servants without reference to the owner, the latter is not responsible for the negligence of the servants of the contractor, unless he was connected with such negligence personally by some act of commission or omission.* There are one or two cases decided by the Supreme Court of Illinois, which seems to hold railroad corporations liable for the acts of the workmen of the contractors, but they may be said to rest on special circumstances, and perhaps do not touch on the rule referred to."

The court then says: "What, then, was the position of the defendant as to this excavation? He had let the work out by contract. The work was to be finished, by the terms of the contract, in September, 1856, but it was not, in fact, completed till February,

1857. It does not clearly appear how the time was extended, but the fact is fully proved and not denied, that the contractors and their workmen remained on the work till the beginning of 1857. *If, then, the contractors were in possession and control of the premises with their servants and agents, and were in their employment, independent of the defendant at the time of the accident, and the defendant was not concerned personally in the negligence which caused it, it follows, from what has been said, that he could not be held responsible for it.*"

It will be seen, at a glance, that the court makes no distinction whatever in any kind of a case, but lays down the broad rule that, if a man undertakes to do any kind of a work, and employs *contractors* to do it, and any accident happen through the carelessness or negligence of the contractors or their servants, that the *owner* of the property or employer would not be liable.

This position I humbly submit, so far as it applies to this case, is erroneous, and is not the law. I contend that this case is an *exception* to the general rule which the court lays down, and that Mr. Robbins, when he dug the hole in the side-walk and excavated the street, committed a *nuisance;* and that when he left that hole uncovered, unprotected and unguarded, that he was guilty of *continuing* the *nuisance*, and that he is liable for all the consequences.

Judgment of Woodbury against the City conclusive on Robbins.

Mr. Robbins having been notified of the pendency of the suit, and having failed to defend the suit, the amount of the judgment, with interest and costs, is conclusive upon him, and upon this point, I quote, particularly, the case of *City of Boston vs. Worthington*, which is in manuscript, but which I believe is parallel in every respect with the case at bar. That case is as follows:

"METCALF, J. Southwick's judgment against the plaintiffs is conclusive against the defendants as to all the facts thereby established, provided the defendants had due notice of the pendency of

the action in which that judgment was recovered and had an opportunity to defend it. So far the adjudications are decisive. In *Littleton vs. Richardson*, 3 Fogg, 187, BELL, J., thus states the law: 'When a person is responsible over to another, either by operation of law or by express contract, and he is duly notified of the pendency of the suit, and requested to take upon him the defence of it, he is *no longer regarded as a stranger*, because he has a right to appear and defend the action, and has the same means and advantages of controverting the claim as if he was the real and nominal party upon the record. In every such case, if due notice is given to such persons, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not.' In addition to the authorities there cited in support of his position, see *Clark vs. Carrington*, 7 Cranch, 322; *Hamilton vs. Cutts*, 4 Mass. 353; *Bond vs. Ward*, 1 Natt & McCord, 201; *Kip vs. Brigham*, 6 Johns, 158.

"It is not denied by the defendants, and cannot be, that they are responsible over to the plaintiffs, by operation of law, if the plaintiffs were held answerable to Southwick by reason of the sole fault of the defendants. *Lowell vs. Boston & Lowell Railroad*, 23 Pick. 24; *Lowell vs. Short*, 4 Cush. 275; *Lowell vs. Spaulding*, 4 Cush. 277.

"Had the defendants such notice of the pendency of Southwick's action, as renders the judgment recovered therein conclusive against them to any extent? We are of opinion that they had. They were informed when Southwick's writ was returnable; that he had sued for an injury received, on a day named, by a defect in the highway, called Congress Square, in a place occupied by them: they were directed to take notice that the plaintiffs would hold them responsible, who had the charge and custody of the place of the accident, and they were required to govern themselves accordingly. They were not, in terms, requested to take upon themselves the defence of that action. And this was not necessary in order to render the judgment conclusive against them as to the facts thereby established. There are numerous cases in which parties have been held bound by judgments recovered in actions of

which they had notice, though they were not expressly requested to defend those actions. *Blasdale vs. Babcock*, 1 Johns. 517; *Barney vs. Dewey*, 13 Johns. 226; *Warner vs. McGary*, 4 Verm. 500; *Beers vs. Pinney*, 12 Wend. 309. The defendants, by the notice given to them of Southwick's action, had an opportunity to defend it, and the case shows that they 'were present at the trial, and testified therein.' This fact, according to SPENCER, J., in 13 Johns. *ubi. sup.*, is sufficient to show such notice as to render the judgment conclusive against them.

"The defect in the highway, for which the plaintiffs were made answerable to Southwick, was an uncovered cellar-way, not protected by such a railing, as was required by the ordinances of the city; and this defect existed before the defendant's occupied the place of the accident. And they contend that they had no legal right to remedy that defect, and, therefore, are not responsible for it, because their lease provided that no alterations nor additions should be made by them, without the written consent of their lessors. But we have no doubt that the repairing of a defect is not an alteration nor an addition, within the meaning of the lease. Nor do we suppose that a covenant by the defendants, with their lessors, to continue a nuisance, would exonerate them from liability to third persons, or to the Commonwealth, for its continuance.

"The judgment recovered by Southwick against the Plaintiffs is conclusive against these defendants on these points:

"That the highway in Congress Square was defective; that Southwick was injured there while using due care; and, that he suffered damage to the amount of twelve thousand dollars. But it is not conclusive against the defendants on the question, whether they were bound to keep the highway safe—or, if they were, that they were guilty of such negligence as would charge them in this suit, or would have charged them, if Southwick had brought an action against them, nor on the question whether Southwick's damage was caused by their sole fault.

"Upon the trial of this action, if it proceeds to trial, the defen-

dants may be permitted to show that they were not bound to make the highway safe—or, if they were, that Southwick's injury was not caused solely, if at all, by their default."

See also 2d volume of Cowen & Hill's Notes to Phillips' Evidence, page 5.

Leather vs. Poultney, 4 Binn. 352—356.
Hamilton vs Cutts, 4 Mass. Rep. 349—353.
Bender vs. Fromberger, 4 Dall. Rep. 436.
Witmer vs. Schlatter, 2 Rawle's Rep. 204.
Bond vs. Ward, 1 Nott & McCord, 201.
Jacob vs. Pierce, 2 Rawle, 204.
Waldo vs. Long, 7 John. 173.
Blasdale vs. Babcock, 1 John, 517.
Barney vs. Dewey, 13 John. 226.
Kip vs. Brigham, 6 John. 158.
Pinney vs. Gleam, 5 Wend. 535.
Tarlton vs. Tarlton, 4 Maule & Sel. 20.
Henderson vs. Levey, 2 Greenl. 139.
Porter vs. Cole, 4 Greenl. 29.

On these grounds and for these reasons, I think that the judgment in this case should be reversed.

IV.

This case has thus far been argued upon the supposition that at the time of the accident the premises were in the possession of a contractor, and that the particular area, which was open, unprotected and ungarded at the time when Woodbury fell into it and was injured, was also in the possession of Button as contractor.

But I beg the court to observe that there is *no such evidence* whatever in the case.

The defendant, on the trial of this case, introduced a contract between himself and one Peter Button for doing the brick work, stone work, lathing, plastering, &c., in which it is provided that the whole work was to be completed on the *first day of September*, 1856; and it was further expressly agreed that *time was* the essence of the contract. (See page 24 & 25, Printed Record.)

Now, if the court will examine this matter it will find that Woodbury, as has been before stated, was injured on the 28th of December, 1856, and that at *that time* the contract between Robbins and Button *had* long since *expired*, and, so fas as the evidence shows, was fully completed.

The contract of Button expired, by its terms, on the 1st day of September, 1856—Woodbury was injured December 28th, 1856.

John H. Sendlebeck, the foreman of Button, (page 25 of record) swears—"We dug the area early in the Spring and then covered it all up in with joists. The iron men then came on from New York and did their work. *We* had the whole space covered snug up to the building. The iron men had their derrick standing on these joists. After they put part of the iron work up, Cook came on and laid the flagging; he took up part of the joists, as he wanted to lay the flagging."

Now, when was this? It does not appear at all; neither does it appear that *any contractor* had any control over the area or the premises; the evidence utterly fails to disclose any such fact.

On the 28th of December, 1856, when Woodbury was hurt, there was *no contractor* who exercised jurisdiction over that open and unprotected area. Button had finished and got through, and so had Cook. Who, then, did have those premises in their possession? The evidence in the case certainly does not disclose any one except Robbins, and if the owner himself did not control it, it is impossible to tell who did.

This fact cannot, therefore, fail to have an important bearing upon the whole case, and *cannot* be overlooked when cases are cited, relating to the subject which are wholly and entirely destitute of *this feature.*

The defendant in this case will produce here the opinion (in manuscript) of the Supreme Court of the State of Illinois in the recent case of *Scammon vs. The City of Chicago*, and will claim that *that* case should govern this court in its decision. If this court will, however, examine that case closely they will find that the judge who decided that case and *undertook* to give reasons for the decision has, most strangely, confounded the whole subject by illustrations drawn from the position of "tenants, reversioners, remainder men, disseizors, wrong-doers in possession," &c., &c., which put at defiance very many generally received notions of the relative rights of parties, and leads us to this conclusion: that if the owner of a piece of property should undertake to construct a building in the city of Chicago, which, by the *plan*, should call for excavating a portion of the public street for his own benefit and convenience, and should let the *job* out by contract, his duty was done; he could, then, put his hands in his pocket and walk off—his duty would be done. He, the owner, when he had *set* his man-traps, and employed his contractor to tend them, could never be called to account, even though half of the community got killed, or maimed, or wounded.

I respectfully submit to this court, that before such a doctrine becomes local law to the thousands of strangers of other States and countries, daily who arrive at and depart from that city, we choose to learn it here. Neither Judge Walker or Judge Drummond gave more than a passing notice to the distinction, which I contend for,

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The case of *Boswell vs. Laird & Chambers*, 8 California, 493, is also referred to as being in point for the defendant; but the court in that case, after quoting various cases in regard to the subject of contractors, say:

"If the injury complained of arose, not from the manner in which the embankment or dam was constructed, but from the fact that it was constructed at all: that is if it was a structure amounting to a nuisance, liability therefor would attach equally to Laird and Chambers, and the contractors, Moore and Foss.

"The authorities limit the liability to cases where structures, amounting to nuisance, are erected on or near, and in respect to *fixed property of the owner, and place the liability on the ground that every man is bound to use and manage his own property* so as not to injure others; when the structure is erected by the *permission* of the owner, there is reason in limiting the liability to cases where the nuisance is placed on or near and in respect to his own property; but, when it is erected by his *express* direction, we can perceive no reason for the limitation. It is not the structure itself, but its character as a nuisance, that causes the injury and creates the liability.

"If the mode and manner which constituted the defect by which the injuries complained of were occasioned, *had been inherent in the plan, and this plan had been devised by Laird and Chambers, which the contractors were simply engaged to carry out, then liability would attach to Laird and Chambers, for injuries occurring in its progress as well as afterwards.*"

and which Judge Strong has so finely stated in *Congreve vs. Smith*, 18 N. Y. 77 & 78, heretofore quoted in this argument.

The case of *Clark vs. Fry*, 8 Ohio, 359, is referred to among others, by the defendant, as an authority in his favor; but if that case is examined closely it will be found that the court distinctly recognize the doctrine, that where anything is to be done under a contract, which is itself unlawful or *necessarily injurious* to a third person, the *employer* as well as the employee would be liable for any injury resulting therefrom.

The case of *Boswell vs. Sand & Chambers*, 8 California, 498, is also referred to as being in point for the defendant; but the court in that case, after quoting various cases in regard to the subject of contractors, say :

The case of *Morgan vs. Bowman*, 22 Missouri, 539, and

The case of *Barry vs. City of St. Louis*, 17 Missouri, 122, are directly in conflict with the case of *Inhabitants of Lowell vs. Boston & Lowell R. R. Co.* 23 Pickering, 24; and I ask particular attention to this case, and also to *Earle vs. Hall*, 2 Met. 353.

See also *Burgess vs. Gray*, 50 Eng. C. L. 579, 1 M. G. & S. 578.

In the case of *Laugher vs. Pointer*, 5 Barn. & Cress. 560, Justice LITTLEDALE lays down this rule: "In all cases where a man is in possession of fixed property he must take care that the property is so used and managed that other persons are not injured, *and that whether his property be managed by his own immediate servants or by contractors*, or their servants. The injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable, when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined, by law, to himself, and he should take care not to bring persons there who do mischief to others.

There are very many other cases which might be cited in support of the positions here assumed; but, without pursuing the subject farther, I conclude with this recapitulation:

1. That the instruction of the court to the jury, which was in these words: "The rule now established is, that if the owner makes a contract for building or repairing a house, and the contractor has an independent employment and service and selects his own agents and servants, without reference to the owner, the latter is not responsible for the negligence of the servants of the contractor, unless he was connected with such negligence personally by some act of commission or omission," is erroneous and is *not* the *law* which should govern this case in view of the *facts* and *circumstances.*

2. Robbins had no license or express permission from the city authorities of the city of Chicago to dig up the street and excavate the sidewalk.

3. The *area*, which Robbins caused to be excavated under the sidewalk in the public street, was a *nuisance*, and when it was left open *unguarded and unprotected* it became a *continuing nuisance*, and Robbins was responsible for all the consequences resulting therefrom, and he cannot shield himself by interposing a contract or contractor.

4. The judgment of Woodbury against the city of Chicago was conclusive on Robbins and he could not question the matters which were brought in issue in that case.

5. At the time Woodbury was injured the contract between Robbins and Button had expired and he was, therefore, in possession of the premises and must be held responsible for the dangerous condition in which it was and for all consequences resulting therefrom.

6. For these reasons I contend that the judgment in this case should be reversed and a new trial awarded.